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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

GREAT COASTAL EXPRESS, INC.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1217

GREAT COASTAL EXPRESS, INC.,
Appellee,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Appellant.

No. 73-2393
No. 73-2448

GREAT COASTAL EXPRESS, INC.,
Appellee-Cross-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Appellant-Cross-Appellee.

No. 81-2073

GREAT COASTAL EXPRESS, INC.,
Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond
Robert R. Merhige, Jr., District Judge

Argued: January 7, 1982 Decided: April 12, 1982

Before BUTZNER, Circuit Judge, INGRAHAM,* Senior Circuit Judge, and RUSSELL, Circuit Judge.

Ira R. Mitzner (Barry Wm. Levine, Kenneth M. Simon, Jeffrey M. Simon, George Kaufmann, Dickstein, Shapiro & Morin on brief) for Appellant; J. W. Alexander, Jr. (Blakeney, Alexander & Machen; James M. Minor, Jr., Minor, Marshall, Forb & Batzli, P.C. on brief) for Appellee.

INGRAHAM, Circuit Judge.

These proceedings were initiated by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT" or "the Union") in an

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* Honorable Joe M. Ingraham, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

effort to obtain relief from a judgment the Union argues was procured through fraud on the court. In No. 80-1217, IBT appeals the denial by the District Court for the Eastern District of Virginia of its Motion to Set Aside Judgment on the grounds of fraud on that court. *Great Coastal Express, Inc., v. International Brotherhood of Teamsters*, 86 F.R.D. 131 (E.D. Va. 1980). In Nos. 73-2393 and 73-2448, the Union has filed an original petition in this court for relief from our affirmance of the underlying judgment, *Great Coastal Express, Inc., v. International Brotherhood of Teamsters*, 511 F.2d 839 (4th Cir. 1975), *cert. denied*, 425 U.S. 975 (1976), on the same grounds.[1]

This dispute arises out of a 1970 strike by IBT against Great Coastal. Great Coastal subsequently brought suit against IBT on two theories: (1) damages to property and equipment caused by union violence; and (2) lost business caused by illegal secondary boycotting. The union violence claim was eliminated from the case by directed verdict at the close of Great Coastal's case in chief. The jury then awarded over $1,000,000 in damages on the secondary boycott claim, which prompted a new trial on damages alone and a second, reduced verdict. The judgment was affirmed as to both liability and damages by this court. *Great Coastal Express, supra.* IBT subsequently uncovered evidence that the company itself had planned and executed several of the acts of violence described during the suit, and petitioned the district court and this court for relief from the judgment. The district court concluded that company witnesses had indeed perjured themselves in the original trial, but that such facts

---

[1] We also have No. 81-2073, an appeal by Great Coastal Express, Inc. ("Great Coastal" or "the company"), plaintiff in the original suit, from recent findings the district court has made to supplement the record at our request, and a motion to dismiss that appeal. No. 81-2073 and the motion to dismiss have been considered together with the consolidated proceedings.

did not constitute a fraud on the court under *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997 (1944), or support an independent action for relief. For reasons developed below, we affirm the denial of relief and deny the direct petition in this court.

I. *Background*

A. History of this Litigation.

Great Coastal is an interstate truck carrier based in Richmond, Virginia. In 1970, the company's employees were represented by Local 592, an affiliate of the IBT. From 1964 to March 31, 1970, the parties were signatories to the National Master Freight Agreement. Negotiations for a new agreement were unsuccessful and local 592 went on strike in August 1970. On December 10, 1970, Great Coastal filed an action in a Virginia state court which was removed by IBT to the Eastern District of Virginia pursuant to 28 U.S.C. § 1441(b), as an action purporting to state a claim under § 8(b)(4) of the Labor-Management Relations Act, 29 U.S.C. 158(b)(4), over which the United States District Courts have original jurisdiction.

The case was tried before a jury on the two theories described above, damages caused by union violence and illegal secondary boycotting. From the outset, union counsel objected to the introduction of evidence of violence that was not shown to be connected to the union. On the proffer of Great Coastal that all such evidence would ultimately be linked to the IBT, the district court permitted the company to go forward. Company witnesses testified to wide-spread and savage acts of violence directed towards its employees and property. At the close of the company's case, however, the district court granted the union's motion for directed verdict on the violence claims, holding that the company had failed to meet its burden under *United Mine Workers v. Gibbs*, 383 U.S. 715, 735-37 (1966), of linking the acts of violence to

IBT. The secondary boycott claim was allowed to go to the jury, and the jury found liability on this ground.

Although counsel for Great Coastal stated during closing argument that it had shown actual damages proximately resulting from the unlawful secondary boycott activities amounting to $942,065, the jury returned a verdict of $1,300,000. On the union's motion for judgment notwithstanding the verdict, the district court concluded that "the damage award . . . was substantially out of touch with damages allegedly proven." 350 F. Supp. 1377, 1938 E.D. Va. 1972). The excessive verdict, in the court's opinion, suggested that:

> The jury, while well intentioned, was in spite of the Court's instructions to the contra influenced in its consideration of damages by the gross and vicious conduct attributed to the members of the local union and their sympathizers.

Id. The court denied the motion for JNOV as to the remaining issues raised by the union, but directed a retrial on damages alone. The second jury reached a verdict of $806,093 and judgment was entered on the secondary boycott claim in that amount.

On appeal to this court, IBT argued that the district court erred in submitting to the jury the question whether the local union and its members were agents of the International; that the company had failed to demonstrate what part of its losses were caused by illegal activity as distinguished from legal activity; that the court erred in restricting the new trial to damages; and that the instructions to the second jury were inconsistent and improper. This court affirmed on all issues. *Great Coastal Express, supra,* 511 F.2d at 841. With respect to the partial new trial issue, the opinion of the court observed that "the union does not contest the fact that there was evidence from which a jury could find an illegal secondary boycott," *id.* at 842, and further, "it goes without

saying that the jury had abundant evidence" to find that IBT had committed unlawful secondary boycotting. *Id.* at 844. We concluded there was no basis for believing that the evidence of violence had so inflamed the jury as to fatally infect the liability verdict with prejudice, particularly in light of the district court instructions, and that IBT had not overcome the presumption of validity of a verdict. *Id.* at 847. Certiorari was denied by the Supreme Court and the union paid Great Coastal a total of $961,653.67, representing the judgment plus interest and costs.

In February of 1977, counsel for IBT first received information that the company had deliberately sabotaged its own equipment on at least one occasion, and had commited other acts of violence in the evident expectation that responsibility for these acts could be laid on the union. Counsel investigated these matters between March and December 1977 and turned over the results of their investigation to the Justice Department. The Department's response in August 1978 was that the applicable statute of limitations precluded any criminal action with respect to the allegations. The Department made a similar response to an inquiry by the district court in November 1979.

IBT filed its motion to set aside the judgment in the district court on December 14, 1978. The court allowed post-judgment discovery and held a two-day evidentiary hearing. At the hearing, two of the company's witnesses from the 1972 trial admitted that part or all of their testimony had been false, and other evidence of fraudulent company practices was introduced. Stressing that the allegations of fraud on the court all were instances of either perjury or fabricated evidence, the district court considered it unnecessary to address the evidence in greater detail but denied relief as a matter of law. The court's decision may be briefly summarized as follows: relief under Federal Rule of Civil Procedure 60(b)(3)

would be forthcoming except that the union had not filed its motion within the Rule's one-year time limitation, and this limitation could not be evaded through use of 60(b)(6); perjury and fabricated evidence do not rise to the level of fraud on the court under the savings provisions of Rule 60(b), and that IBT had not shown attorney involvement in the fraud; and similarly that perjury and fabricated evidence were "intrinsic" rather than "extrinsic" forms of fraud and would not support an independent action in equity for relief from a judgment. *Great Coastal Express v. International Brotherhood of Teamsters*, 86 F.R.D. 131, 136-40 (E.D. Va. 1980). This is the principal decision appealed from.

The case was briefed and argued before this panel at the November 1980 sitting. We remanded with directions that the district court supplement the record with specific findings of fact based upon the evidentiary hearing that had been held. The district court provided these findings by memorandum dated August 27, 1981, and we allowed supplemental briefing and further oral argument.

B. The District Court's Findings of Perjury and Fabricated Evidence.[2]

The district court found that in October of 1970 during the strike Robert Seward, an employee of Great Coastal, was ordered by Terminal Manager William Funai to get a brick or rock, take a company truck out on the road and "tear it up some." Seward drove the company truck to Route 33 past New Kent, Virginia, broke the windshield of the truck with a brick, and fired three shots into the front of the trailer with a small caliber hand gun. Seward thereafter executed several false affidavits describing this incident, concealing the true events and claiming "unidentified persons" had sabotaged the truck.

[2] While we note Great Coastal's objections to various findings made by the district court, the record is clear and essentially undisputed on the matters relevant to the disposition of the case.

One of these affidavits was incorporated into Great Coastal's answers to interrogatories as "direct evidence of specific instances of violence, intimidation and secondary boycotting activity." Evidence was also adduced that Funai sent Seward and other company employees to the yards of competing companies that had hired some of the striking Great Coastal drivers, and sabotaged trucks in those yards.

After the strike, and after Local 592 had been decertified as representative of the company's employees as the result of an election, Seward received a $500 payment from C. E. Estes, president of the company. Estes told Seward to keep the payment to himself and to consider it a "Christmas bonus or pay for a job well done." The $500 is not reflected anywhere on the company's books and records. Funai also received a payment, a share of the IBT judgment, of approximately $12,000. This payment was ostensibly part of the company's profit-sharing plan; however, Funai was not employed by the company at the time of the recovery of the IBT judgment, and therefore payment of this share to Funai was contrary to company policy regarding profit-sharing.

The district court found that Seward had falsely testified in the 1972 trial, as to the New Kent incident and the company's role in fabricating acts of violence, and also that Funai failed to tell the complete truth in violation of his oath as a witness in that trial. The court concluded as follows:

> The Court is satisfied and finds as a fact that much of the testimony offered by the plaintiff in the first trial dealing with the alleged acts of violence by the defendant were perjured.
>
> Just as the perjurors are, regrettably, free from prosecution for perjury by virtue of the statute of limitations, the one year limitation precludes the instant defendant from relief under Rule 60(b)(3) for

the reasons stated in the Court's memorandum of February 29, 1980.

II. *Discussion*

At the outset, Great Coastal urges that the fraud uncovered by the union, inasmuch as it relates to acts of violence, became immaterial once the violence claim was eliminated by directed verdict. The judgment under attack, the company continues, is a secondary boycott judgment that this court has already affirmed in no uncertain terms. We note that this argument is, in effect, that any fraud in the case was harmless error, and that strictly speaking discussion of such a question should be preceded by the threshold determination of whether error has occurred at all (or, in this case, whether the fraud is the type justifying relief from judgment). Nevertheless, we will briefly consider the company's argument here because the parties have given it some priority and it is the principal point stressed in all of the company's submissions to this court.

The position of IBT is that once fraud enters the case in any manner, the judgment must be vitiated without further inquiry as to the materiality or effect of the fraud on the judgment, citing *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944). In *Hazel-Atlas*, the successful litigant had used an article in a trade publication in support of a patent application, and subsequently defended the patent in the federal courts. However, in its zeal to assure the success of the patent, company officials had fraudulently attributed the authorship of the article to a nationally known, supposedly impartial figure when in reality the article was authored by a company patent attorney. The Supreme Court noted that whatever influence the article may or may not have had on the patent office and the courts, the company clearly thought it was material and went to some trouble to procure it. The IBT particularly relies on the follow-

ing language: "[T]hey urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness." 322 U.S. at 247.

No doubt in cases like *Hazel-Atlas*, where a single cause of action is involved, the IBT's position has merit. A case such as ours, where separate and independent causes of action were alleged, is in that respect somewhat different and we do not believe *Hazel-Atlas* provides a complete answer. We might be receptive to the company's position that the secondary boycott judgment was insulated from the fraud if in fact the violence claim was effectively and entirely eliminated from the jury's consideration. In such a case, materiality may well be a proper inquiry. *Cf. Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 650 F.2d 9, 12 (2d Cir. 1981); *Wilkin v. Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973); *Mas v. Coca Cola*, 163 F.2d 505, 508 (4th Cir. 1947).

We cannot say with complete confidence, however, that the fraud was harmlessly excised from the case. This is primarily because of the following factual considerations. First, at the close of the first trial in 1972 the district court did instruct the jury that they were not to consider the evidence of acts of violence in reference to any damages from secondary boycotting, and that the jury should only concern itself with the second boycott claim. However, near the close of his instructions the district court also stated:

> Don't get off on those despicable acts that were testified to. We are not involved with that anymore with reference to the issue right before you except as a totality of circumstances which may or may not have any bearing on it.

Thus, there is the possibility that the perjury and fabricated evidence at issue may have been considered by the jury as part of the "totality of circumstances." As we

have noted above, in the course of ordering a partial new trial, the district court acknowledged that the jury may have been improperly influenced by the evidence of acts of violence.

Secondly, the company's brief to this court on its prior appeal contained repeated references to the evidence of violence, with specific reference to the New Kent incident and sabotage of equipment. The company argued:

> The Union's efforts to persuade non-striking employees to stop work were not restricted to peaceful means. Again and again, during the long period of the strike, resort was had to extreme violence. . . . It would have been permissible for the jury to find, upon these facts, that the Union drew upon the force of the violent acts for its benefit. In combination with the other illegal hot cargo and secondary boycott activity, which was inextricably tied in with the violence, the company's business was brought to a total standstill.

Such argumentation falls directly within the prescription of *Hazel-Atlas* quoted above, *see also* 322 U.S. at 241, and we are precluded from inquiring as to the materiality or effect on this court's decision.

A. Relief from Judgments Under Rule 60(b).

Respect for the finality of judgments is deeply engrained in our legal system. As Justice Story observed, "[i]t is for the public interest and policy to make an end to litigation . . ." so that "suits may not be immortal, while men are mortal." *Ocean Ins. Co. v. Fields*, 18 F. Cas. 532, 539 (C.C.D. Mass. 1841) (Story, J. sitting as Circuit Judge). *See also Southern Pacific RR Co. v. United States*, 168 U.S. 1, 49 (1897). Equally compelling circumstances may arise, however, in which parties are entitled to be relieved of an unjust judgment arrived at through mistake, ignorance, inadvertence or misconduct.

See, e.g., Publicker v. Shallcross, 106 F.2d 949, 952 (3d Cir. 1939), *cert. denied*, 308 U.S. 624 (1940) ("We believe truth is more important than the trouble it takes to get it.")

Federal Rule of Civil Procedure 60 provides the terms on which these two principles are balanced. Rule 60(b)(3) allows a court to relieve a party from final judgment on the grounds of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." A motion under 60(b)(3), however, must be made within one year after the judgment was entered. Thus, the Rule suggests that equitable considerations prevail in such cases for one year, and that the interest in finality of judgments prevails thereafter.

We are in complete accord with the conclusions of the district court that 60(b)(3) would have provided relief in this case had the union's motion been timely, and also that 60(b)(6) ("any other reason justifying relief") cannot be used to circumvent the one-year limitation for grounds specified previously in the rule. 86 F.R.D. at 136-37. *See also Kerwit Medical Products, Inc., v. N & H Instruments, Inc.*, 616 F.2d 833, 836-37 n.8 (5th Cir. 1980). We therefore turn to the savings provisions in Rule 60(b).

B. "Fraud on the Court"

IBT has continuously asserted that it seeks relief from fraud on the court under *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). Rule 60(b) specifically provides that "this rule does not limit the power of a court to . . . set aside a judgment for fraud upon the court," and the 1946 Notes of the Advisory Committee cites *Hazel-Atlas* "as an illustration of this situation."

The Supreme Court's opinion in *Hazel-Atlas* reveals the following facts. Hartford-Empire Company had sought

a patent for a device that manufactured glass by a process known as "gob-feeding." Faced with "apparently insurmountable Patent Office opposition," Hartford officials devised a scheme for the deliberate purpose of deceiving the hostile Patent Office into awarding them a patent. The scheme was to have a Hartford patent attorney prepare an article praising the process and then procure the signature of an ostensibly disinterested and respected pseudo-author. This plan was carried out and, with the article included in the application, a patent was granted. Shortly thereafter Hartford brought suit in a federal district court charging Hazel-Atlas with infringing the patent. Although the article was part of the voluminous record, the district court dismissed the suit without reference to the article on the ground that no infringement was proved. On appeal, however, Hartford directed the court's attention to the article and the court of appeals reversed, quoting the article at some length.

Hazel-Atlas had received preliminary information during the litigation that the authorship of the article was fraudulent. Following the court of appeals decision, investigation began in earnest. Although investigators for Hazel-Atlas reported little success from their discussions with the ostensible author, Hartford representatives who had been in clandestine contact with him reported "very successful results," specifically that the "author" was cooperative and would be of great assistance. In the weeks that followed, Hartford paid the author $8000, explaining the payments as a "moral obligation" of the company although there was no prior agreement between the parties that the individual would be compensated.

Hazel-Atlas eventually brought suit only after the facts were fully disclosed in a separate lawsuit. The court of appeals denied relief on the grounds that the fraud was not newly discovered, that the article was not a primary basis of its earlier decision, and that it lacked the power to set aside a decree after the expiration of the court

term in which the decree was rendered. The Supreme Court reversed.

The pertinent parts of the Supreme Court's analysis are as follows: The Court first reasserted the historical equity power of courts to set aside judgments, the enforcement of which would be manifestly unconscionable. The Court characterized the fraud as a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." 322 U.S. at 245-46. Furthermore, the litigation involved did not merely concern the private parties but also "issues of great public moment" associated with the legal monopoly afforded by a patent. *Id.* at 246. The court concluded that the "term rule" was not a bar to equitable relief in such circumstances and directed that the original judgment be set aside. *Id.* at 248-51.

IBT urges that this case presents all the critical elements of fraud in the *Hazel-Atlas case*: specifically, that the fabricated testimony here was intended to "help along" the company's damage suit, just as Hartford used the article to help along its patent application; and that both Hartford and Great Coastal tried to buy the silence of the conspirators. The analogy is indeed close in some respects, however we must ultimately reject it.

The federal courts that have struggled with the definition of "fraud on the court" in the context of Rule 60(b) have found such a definition elusive, *see, e.g., Toscano v. Commissioner*, 441 F.2d 930, 933-34 (9th Cir. 1971), but have generally agreed that the concept should be construed very narrowly, *see, e.g., Kerwit Medical Products, Inc., v. N & H Instruments, Inc.*, 616 F.2d 833, 836-37 (5th Cir. 1980); *Senate Realty Corp. v. Commissioner*, 511 F.2d 929, 931, 932-33 (2d Cir. 1975). The principal concern motivating narrow construction is that the otherwise nebulous concept of "fraud on the court" could easily overwhelm the specific provision of 60(b)(3) and its time limitation and thereby subvert the balance of equi-

ties contained in the Rule. *See Kupferman v. Consolidated Research & Manufacturing Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972); 7 Moore's Federal Practice § 60.33 at 511 (1971). Not all fraud is "fraud on the court." 11 Wright & Miller, Federal Practice and Procedure § 2870 at 253 (1973). Thus "fraud on the court" is typically confined to the most egregious cases, such as bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged. *See Addington v. Farmers Elevator Mutual Ins. Co.*, 650 F.2d 663, 668 (5th Cir.), *cert. denied*, —— U.S. —— (1981); *Lockwood v. Bowles*, 46 F.R.D. 625, 630 (D.D.C. 1969). Professor Moore's suggested formulation is often cited, although the *Toscano* court observed that it still leaves many aspects of the issue unresolved:

> "Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. Fraud *inter partes*, without more, should not be a fraud upon the court, but redress should be left to a motion under 60(b)(3) or to the independent action.

7 Moore's Federal Practice § 60.33 at 515 (1971); *see also Martina Theater Corp. v. Schine Chain Theaters*, 278 F.2d 798 (2d Cir. 1960) (following Moore).

In this light we cannot say that the fraud in this case presents a deliberate scheme to directly subvert the judicial process, sufficient to constitute fraud on the court. It is also apparent that the fraud here primarily concerns the two parties involved and does not threaten the public

injury that a fraudulently-obtained legal monopoly did in *Hazel-Atlas*. *Cf.* Comment, 60 Cal.L.Rev. 531, 557 (1972).

Despite the confusion inherent in this doctrine, we are not totally without guideposts. We concur in the appraisal of the district court that the fraud here consists of perjury and fabricated evidence. Early in the Court's analysis in *Hazel-Atlas*, the Court commented, "This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." 322 U.S. at 245. Motivated at least in part by this language, courts confronting the issue have consistently held that perjury or fabricated evidence are not grounds for relief as "fraud on the court." *See, e.g., Pfizer, Inc., v. International Rectifier Corp.*, 538 F.2d 180, 193-95 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977); *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972); *Porcelli v. Joseph Schlitz Brewing Co.*, 78 F.R.D. 499 (E.D. Wisc.), *aff'd without opinion*, 588 F.2d 838 (7th Cir. 1978); *Koningsberg v. Security National Bank*, 66 F.R.D. 439, 442 (S.D. N.Y. 1975); *Lockwood v. Bowles*, 46 F.R.D. 625, 630 (D.D.C. 1969). *See also* RESTATEMENT OF JUDGMENTS § 126(2)(b). This conclusion is consistent with the general definitional principles just described. Perjury and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out as early as possible. In addition, the legal system contains other sanctions against perjury. *See Lockwood v. Bowles*, 46 F.R.D. 625 (D.D.C. 1969); *Shammas v. Shammas*, 9 N.J. 321, 88 A.2d 204 (1952) (Brennan, J.). Fraud on the court is therefore limited to the more egregious forms of subversion of the legal process already suggested, those that we cannot necessarily expect to be exposed by the normal adversary process.

IBT also takes exception to the district court's conclusion that fraud on the court requires involvement by attorneys. Involvement of an attorney, as an officer of the court, in a scheme to suborn perjury would certainly be considered fraud on the court. IBT points out, however, that the record in *Hazel-Atlas* indicates that the company "attorney" who prepared the article with the intent that it be signed by another was in fact a "patent attorney," a title given at least at that time to any registered patent agent, and that he had not attended law school and was not the member of any bar. Other circuits have also recognized that fraud on the court can occur without the involvement of attorneys. *See Toscano v. Commissioner*, 441 F.2d 930, 933-34 (9th Cir. 1971); *Lim Kwock Soon v. Brownell*, 369 F.2d 808 (5th Cir. 1966). However, in view of our holding that the type of fraud in this case does not rise to the level of fraud on the court, we need not consider the question of attorney involvement.

We therefore conclude that the company's actions, however reprehensible, are not tantamount to fraud on the court.[3]

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[3] IBT argues that the acts of violence directly affected the damage calculation in the second trial as well, because Great Coastal's President repeatedly mentioned the effect of violence on the company and the company's damage study implicitly includes costs incurred by violence. As the preceding discussion indicates, we do not feel that Great Coastal has perpetrated a fraud on the court. Nevertheless the union's argument also suggests that the damage award may be factually incorrect because the union is not responsible for any loss of profit caused by the expense of remedying company-inflicted damage. This method of attack must also be rejected. The jury was carefully instructed that the only damages recoverable were those proximately caused by illegal secondary boycott activity. We have already observed, in the prior decision of this court quoted above, that there was abundant evidence of damage caused by the second boycotting alone. The jury's verdict

C. Independent Action in Equity.

While the IBT initially proceeded under the theory of fraud on the court under *Hazel-Atlas* and not under the second savings provision of Rule 60(b), the independent action in equity, the district court nevertheless considered and rejected the applicability of this doctrine and IBT has addressed the issue in its briefs. The district court followed the intrinsic/extrinsic fraud distinction described in *United States v. Throckmorton*, 98 U.S. 61 (1878). Under this doctrine, fraud must be "extrinsic" to justify relief, that is, fraud that actually prevented an issue from being joined or a party from making a valid claim or defense. *See Bizzell v. Hemingway*, 548 F.2d 505 (4th Cir. 1977) (collusion between plaintiff's attorney and opposing party). Notwithstanding the considerable criticism leveled against the intrinsic/extrinsic distinction, *see, e.g.*, 11 Wright & Miller, Federal Practice and Procedure § 2868 at 240 (1973), and the debate regarding the effect of *Marshall v. Holmes*, 141 U.S. 589 (1891), on the question, it is clear that perjury and false testimony are not grounds for relief in an independent action in the Fourth Circuit for many of the same reasons that apply to fraud on the court. *See Durham v. New Amsterdam Casualty Co.*, 208 F.2d 342, 345 (4th Cir. 1953); *Aetna Casualty & Surety Co. v. Abbott*, 130 F.2d 40, 43-44 (4th Cir. 1942); *Chrysler Corp. v. Superior Dodge, Inc.*, 83 F.R.D. 179, 186 (D.Md. 1979); *Prickett v. Duke Power Co.*, 49 F.R.D. 116, 118 (D.S.C. 1970).

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was *less* than the company's study projected. When the jury is properly instructed and its verdict is supported by substantial evidence, as we observed in 1975 in this case, our inquiry is ended and we cannot speculate how the particular figure was decided. *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 n.6 (5th Cir. 1978); *Burger Chef Systems, Inc., v. Melfred Co.*, 547 F.2d 786, 791 (4th Cir. 1976).

Referring, apparently, to the extrinsic/intrinsic distinction, IBT argues that the independent action doctrine requires only that the fraud, if disclosed, "would have made a difference in the way . . . counsel approached the case or prepared for trial," citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339-42 (5th Cir. 1978). Under such a formula, the union claims if it had known the truth in this case it would have thoroughly impeached the company's witnesses. We believe the more complete inquiry is described in *Addington v. Farmers Elevator Mutual Ins. Co.*, 650 F.2d 663, 667-68 (5th Cir.), *cert. denied*, —— U.S. —— (1981):

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of defendant; and (5) the absence of any adequate remedy at law.

(cites omitted). The particular element that is lacking in this case is a good defense to the action that the IBT was prevented from discovering or asserting because of the fraud. Both parties recognize that the judgment under attack here is the secondary boycott judgment: the union has not proffered any defense to liability for secondary boycotting that it was precluded from asserting because of the company's perjury and we frankly cannot perceive one in light of the comments on the evidence made on the prior appeal, quoted in part *supra*. Relief was properly denied on this ground as well.

III. *Conclusion*

We affirm the district court's denial of relief in No. 80-1217 and dismiss the petitions in Nos. 73-2393 and 73-2448. The company's appeal No. 81-2073 is dismissed.

SO ORDERED.

BUTZNER, Circuit Judge, dissenting:

I agree with the district court and part II A of the majority opinion that the union would be entitled to prevail had it filed its motion to set aside the judgment, which the company fraudulently obtained, within the one-year period of limitations prescribed by Rule 60(b). But I do not agree that the one-year limitation bars relief to the union. Because the union did not institute proceedings to set aside Great Coastal's judgment within one year after its entry, it must show that Great Coastal practiced fraud upon the court. The rule provides that this type of fraud is not subject to the one-year limitation.

I dissent from the majority's conclusion that Great Coastal's fraud does not rise to the level of fraud on the court. The facts satisfy the requirements of fraud on the court that are set forth in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). Rule 60(b) was amended in 1946 to reflect the principles expounded in *Hazel-Atlas*, and the Notes of the Advisory Committee clarify the concept of fraud on the court by citing *Hazel-Atlas* as "an illustration of this situation" which the amended rule addresses.

I

Pursuant to the directions of this court, the district court made supplementary findings of fact derived from the 1979 evidentiary hearing on the union's motion for relief from the judgment granted Great Coastal. The district court's findings on remand clearly establish that the officers and employees of Great Coastal engaged in an extensive, deliberate scheme to subvert justice by perpetrating a fraud on administrative and judicial tribunals. Because the district court's findings are essential for the resolution of this appeal, they are quoted as follows:

> At the evidentiary hearing upon the union's motion to set aside judgment for alleged fraud upon the

Court, the union presented nine witnesses: (1) Robert G. Seward, a driver for Great Coastal during the strike; (2) Betty Seward, Robert Seward's wife; (3) William P. Funai, Great Coastal's Terminal Manager during the strike; (4) William Stagg, Jr., Great Coastal's Assistant Terminal Manager during the strike; (5) John Martini, a Great Coastal driver during the strike; (6) Samuel Rogers, a Great Coastal driver during the strike, presently employed by Great Coastal; (7) Mack Fifer, a Great Coastal driver during the strike, presently employed by Great Coastal; (8) Edmond Christian Nuckols, Jr., a Great Coastal employee during the strike; and (9) Carmello Thomas Tuminello, Supervisor and Dispatcher for Adley Express during the strike.

No witnesses were called on behalf of [Great Coastal].

Charles E. Estes is presently President and owner of Great Coastal, and held those same positions during the strike. During the strike, William P. Funai, the Terminal Manager of Great Coastal, routinely reported any damage of Great Coastal equipment to Estes. Estes personally negotiated the profit-sharing arrangements between key managerial employees and Great Coastal. Funai was a key managerial employee who had direct supervision over the drivers, with the right to hire and fire drivers. Funai described himself as "the boss" of the terminal; a fact which corroborated the testimony of Seward. The drivers took their instructions directly from Funai, and Funai took his instructions directly from Mr. Estes. Funai was on profit-sharing during the strike, a status reserved by the company for managerial personnel. Funai, according to Great Coastal, was entitled to 2% of all Great Coastal profits in excess of $100,000.00 by virtue of his status as a manager; in fact, he received $12,024.22 as his prorated share of the IBT judgment.

Edward L. Flinn was manager of Great Coastal during the strike, and is presently a manager with the company. As a manager, Flinn, according to Great Coastal, was on profit-sharing during the strike, and was entitled to 2% of all of Great Coastal's profits in excess of $100,000.00. Flinn received $12,731.12 as his prorated share of the IBT judgment.

Robert Williams was Great Coastal's maintenance supervisor and shop foreman during the strike, a position which he presently holds. Williams was part of Great Coastal's management during the strike and was entitled to 2% of all Great Coastal profits in excess of $100,000.00. Williams received $12,822.69 as his share of the IBT judgment.

One morning during the strike William Stagg, Assistant Terminal Manager of Great Coastal, was told by C. E. Estes that he wanted to see Great Coastal's Terminal Manager, William Funai. Stagg, in turn, told Funai, who was at his desk adjacent to Stagg's, that Estes wanted to see him. In response to the message, Funai went directly to the second floor where Estes' office was located. In approximately ten to fifteen minutes, Funai came down the stairs and immediately told Stagg to get the pickup truck and go to Belk Floor Covering to relieve Robert Seward. Stagg had never before been asked to relieve any drivers during the strike and it was "very unusual" that the request was made in this instance inasmuch as other drivers were idle and available. Nevertheless, in accordance with Funai's instructions, Stagg got in the company pickup truck, and drove to Belk Floor Covering.

On that day, October 23, 1970, Robert Seward was unloading a truck at Belk Floor Covering in the City of Richmond when he was instructed by Stagg

to go back to the terminal. Seward got in the pickup truck left by Stagg and went to the terminal while Stagg finished unloading the trailer at Belk Floor Covering.

Seward went directly to the terminal office and reported to his boss, William Funai, who ordered Seward to get a brick or a rock, to take a truck to West Point, to break out the windshield of the truck and to "tear it up some". Funai and Seward discussed the fact that Seward was "going to break up the truck", was going to "shoot the truck" with a gun, and that Seward should wear gloves because "there might be fingerprints".

As instructed, Seward got a half brick off of the Great Coastal yard and drove a Great Coastal truck to Route 33 off Interstate 64, past New Kent, and pulled off the road. Seward, wearing gloves in an effort to avoid fingerprints, threw the brick at the windshield on the passenger side three times; the brick bounced off the windshield the first two times, but on the third blow crashed through its center. He then fired three shots into the front of the Great Coastal trailer using a small handgun—a cheap .22 caliber "Saturday Night Special".

Seward then proceeded on Route 33 to Green's Restaurant, called the terminal and spoke with Ed Flinn, but rather than tell Flinn the truth, Seward told a contrived story to the effect that unidentified persons had sabotaged the truck. Thereafter, the police arrived and Seward took the officer down the road to a point where a high bank rises from the highway and then levels off into the woods. Although that was not where Seward in fact had inflicted the damage, Seward, in telling his lie to the police, designated that as the place where a brick had been thrown at the windshield of his truck,

where he heard gunshots, and where he saw men running from the bank away from the road through the woods. Later that same day Stagg and the employees at the terminal learned that Seward's tractor windshield had been knocked out and his trailer had been "shot up".

Seward executed a false affidavit concerning the New Kent incident, identified as IBT Exhibit 3. That affidavit was witnessed by Edward L. Flinn, and was specifically incorporated in Great Coastal's answer to IBT Interrogatory No. 14 as "direct evidence of specific instances of violence, intimidation and secondary boycotting activities which are recorded in written statements attached hereto". Great Coastal's answers to IBT's interrogatories were executed under oath by E. C. Estes, Great Coastal's President, and filed with this Court on March 25, 1971.

Seward gave a false affidavit concerning the New Kent incident, identified as IBT Exhibit 4, to a representative of the National Labor Relations Board. Seward also testified falsely about the New Kent incident in a proceeding before the National Labor Relations Board.

Seward was called as a witness for Great Coastal at the trial before this Court on June 15, 1972. He falsely testified that he was driving toward New Kent in October 1970 when a brick came through the windshield on the passenger side, and that he saw men running away through the woods. Seward admitted at the hearing in July, 1979 that he gave perjured testimony before this Court in 1972.

William P. Funai was called as a witness for Great Coastal at the trial before this Court on June 15, 1972 and testified that during the strike he went to West Point, Virginia to look at a Great

Coastal truck and saw "[t]he front windshield was broken on it" and there was "a small hole" in the trailer which looked like it was caused by "a shot, a small caliber gun". When asked in 1972 whether he "saw anybody do anything to that truck", Funai answered, "I seen the damage . . . and nothing else". Funai now concedes that he failed to "tell the truth, the whole truth, and nothing but the truth" in his 1972 testimony; he admits that he failed to tell everything he knew about the New Kent incident to the Court and he therefore violated his sworn oath before this Court. When Funai asked whether he told Seward to sabotage his equipment, Funai refused to answer "on the grounds that the answer may tend to incriminate me".

The Court's conclusion as to Seward's having testified falsely at the first trial is made independent of Funai's exercise of his right against self-incrimination.

Edward Flinn is presently manager at Great Coastal and was also manager at the company during the strike. Some time in 1978 Robert Seward spoke with Ed Flinn at the Great Coastal terminal and told Flinn the truth about the New Kent incident. Flinn stated to Seward that at one time he, Flinn, was trying to trace down the New Kent incident, but someone told Flinn to "lay off" because he was "getting close to something in his investigation". The Court's finding in this regard is admittedly prompted by the absence of any testimonial denial on the part of [Great Coastal].

When Local 592 struck Great Coastal in 1970, Adley Express, a trucking company in the Richmond area, enjoyed a greater demand for its services and began hiring extra roadmen who were out on strike against Great Coastal. After the strike began, Ed Flinn, manager of Great Coastal, placed a telephone

call to Carmello Thomas Tuminello, dispatcher at Adley. Flinn wanted to know who was in charge at the time, and Tuminello responded that he was. Flinn said, "I'd like to see if you could do us a favor" and asked if Adley was "running any extra road drivers that are out on strike that work at Great Coastal". When Tuminello responded that Adley was running six or seven of them every night, Flinn asked if Adley "could stop running the roadmen on the road, so we could starve the sons of bitches out and make them come back to work at Great Coastal". Flinn went on to say that this would help Great Coastal "get rid of the union". Tuminello told Flinn that his boss, the terminal manager, who was not there at that moment, said the men were qualified drivers, Adley needed extra men, and he would continue to run them until he had further notice from his own boss.

During the strike Seward was ordered by Funai to go to Adley and East Coast to "punch tires and tear up trucks" [Tr. 40,95(Seward)]. Funai handed three "punches" to Seward that were prepared in Great Coastal's maintenance shop and sent him to a motel in Richmond to wait for the other members of the "raiding" party.

That night Seward was met at the motel by three other Great Coastal employees, Sam Rogers, Mack Fifer and Chris Nuckols, and together, upon orders from Funai, they went on a "raid" to Adley, driving to Adley in Nuckols' car. Seward, Rogers and Nuckols punctured tires while Fifer slashed the air hoses off the Adley trucks. Tuminello spotted the four marauders under the Adley trucks while making a yard check, but by the time he returned with assistance, all he found were punctured tires and slashed air lines on the Adley equipment. Tuminello noted that one was wearing a Great Coastal jacket

and later recalled the identity of one of them as "Seward".

Thereafter, similar acts of vandalism were conducted by Seward and Nuckols at the East Coast Freight yard. Seward was corroborated in regard to these acts by several witnesses.

During the strike Funai asked Seward to shoot the windows out of the Great Coastal office with an old double barrel shotgun. Seward declined because there were pickets nearby and the police were also in the vicinity.

Also during the strike, Funai instructed Seward and Chris Nuckols to purchase a slingshot for the purpose of breaking truck windshields. The testimony of Seward in this regard is corroborated by Nuckols. Seward and Nuckols purchased a slingshot from a sporting goods store, and Seward was with Funai, the Terminal Manager, when Funai submitted a ticket to Great Coastal petty cash for reimbursement of the slingshot. Seward and Nuckols tried to use the slingshot in the Great Coastal yard to break the windshield of Great Coastal trucks, but their efforts were to no avail because the shot could not be propelled with sufficient force to damage the windshield glass.

During the strike Martini heard Estes and Flinn express their appreciation to the drivers for their "irritation and agitation" of the pickets. Martini also heard Estes and other officers of Great Coastal express appreciation when Great Coastal trucks would come in damaged. In response to an inquiry from the Court on the attitude of Great Coastal managers about damage to the trucks, Martini testified that when damaged equipment came into the terminal, these officials would say words to the effect that, "this is what we need".

On November 24, 1971, as a result of an election, the National Labor Relations Board decertified Local 592 as representative of Great Coastal employees. Seward had, at the request of a Great Coastal manager, been active in seeking the decertification of the union.

Within three weeks of Great Coastal's elimination of the union, Estes called Seward into his office and handed Seward $500.00 in cash. At that time, Estes said to Seward, "keep it to [your]self", and told Seward he could "call it a Christmas bonus or pay for a job well done". This $500.00 payment is no where reflected on the company's books and records. Certain of the company's records for the relevant time period have been destroyed, but Great Coastal's custodian of records has no recollection of the circumstances underlying the destruction of those documents.

Emmett Williamson, Great Coastal's Treasurer and General Manager, testified that during the strike each "managerial" employee who was on profit-sharing with Great Coastal was "reassured by the company that he would receive his agreed percentage of profits if the company were later to recover damages from the union".

Notwithstanding the company policy that a manager on profit-sharing must have been with Great Coastal at the time of recovery against the IBT, William P. Funai, in July 1976—more than five years after Funai had left the employ of Great Coastal—received $12,024.22 ($8,927.99 net after-tax dollars) as his share of Great Coastal's recovery against the IBT.

The Court is satisfied and finds as a fact that much of the testimony offered by the plaintiff in the first trial dealing with the alleged acts of violence by the defendant was perjured.

> Just as the perjurors are, regrettably, free from prosecution for perjury by virtue of the statute of limitations, the one year limitations precludes the instant defendant from relief under Rule 60(b)(3) for the reasons stated in the Court's memorandum of February 29, 1980.[1]

To the district court's findings I need add only that Great Coastal persisted in its fraud when this court heard the union's appeal from the judgment awarding the company damages for the secondary boycott. Contrary to its present position, Great Coastal asserted in its brief that the secondary boycott activity "was inextricably tied in with violence . . . ." Great Coastal, however, did not reveal that this violence was self-inflicted. Instead, its brief relied on the perjured testimony of Seward and its other witnesses, and it embellished the appellate record with photographs of the truck that Seward, acting on orders of company officials, had damaged with a brick and bullets.

II

It may be well to dispel at the outset the notion that proof of bribery of a judge or juror or of fraud perpetrated by other officers of the court is an essential element of fraud on a court. To be sure, this wrongdoing would be a badge of such fraud, but the opinion in *Hazel-Atlas* did not rely on this type of misconduct. Commentators have suggested that involvement of an attorney is an essential component of fraud on the court when misconduct of other officers of the court is not established.[2] The Supreme Court, however, neither predicated its decision in *Hazel-Atlas* on the narrow ground of an attorney's involvement in the litigant's fraud, nor did it iden-

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[1] The district court's memorandum of February 29, 1980, is reported as Great Coastal Express v. International Brotherhood of Teamsters, 86 F.R.D. 131 (E.D. Va. 1980).

[2] *See* 7 Moore's Federal Practice ¶ 60.33 at 513-15; 11 Wright & Miller, Federal Practice & Procedure § 2870 at 256.

tify this as an element of fraud on the court. Consequently, a civil judgment may be set aside because of a litigant's fraud on the court though no wrongdoing is ascribed to an attorney or other officer of the court. Toscano v. Commissioner, 441 F.2d 930 (9th Cir. 1971); *Lim Kwock Soon v. Brownell*, 369 F.2d 808 (5th Cir. 1966); Dausuel v. Dausuel, 195 F.2d 774 (D.C. Cir. 1952).

Parenthetically, I note that if proof of fraud by an attorney is required, Great Coastal can retain its fraudulently obtained judgment. Great Coastal's attorneys did not participate in this fraud, and the union does not charge that they did. The sole perpetrators of the fraud were the company's officers and employees who, along with the company, have profitted handsomely from the judgment.

Also, it may be well to put aside the notion that all fraud that injures an opponent must be brought to the attention of the court within one year of the entry of judgment when bribery of the court or other such egregious misconduct is not alleged. In *Hazel-Atlas*, the defrauded litigant was mulcted of one million dollars, and the judgment had been entered eight years before it was challenged. The Court acknowledged that "in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered." 322 U.S. at 244. But there are exceptions to this general rule. Notwithstanding the eight-year delay, the opinion affirmed the power of federal courts to set aside a fraudulent judgment, saying: "But where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable,' they have wielded the power without hesitation." 322 U.S. at 244-45 (citations omitted)

In *Hazel-Atlas*, the occasion demanding relief was, as here, a judgment obtained by fabricated evidence. There it was a spurious publication to sustain a litigant's claim to a patent both at proceedings in the patent office and in

court. The enormity of this long concealed fraud elicited from the Court both condemnation and the proper response of the judiciary. The Court said: 322 U.S. at 246

> Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud. 322 U.S. at 246

III

Hazel-Atlas explains that a court's power to grant equitable relief against a fraudulent judgment is not a creature of statute; nor, I might add, is it a creature of Rule 60(b). The Court stated:

> It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations. 322 U.S. at 248

Hazel-Atlas requires proof of two elements to establish fraud on the court for the purpose of setting aside a civil judgment when the court itself has not been compromised by bribery or corruption. These two elements distinguish

fraud on the court from the type of fraud that Rule 60(b) requires to be asserted within one year. The first is that the judgment involves an issue "of great moment to the public . . . ." 322 U.S. at 246. A dispute that concerns only private litigants is not enough. *See* S & E Contractors, Inc., v. United States, 406 U.S. 1, 15 (1972) (dictum).

Hazel-Atlas dealt with an affront to the public's interest in the integrity of the nation's patent laws. This case involves an assault on the public's interest in the integrity of the laws governing our national labor policy. There can be no doubt that the dispute between the company and the union implicated interests beyond those of the litigants. Section 1 of the Labor Management Relations Act, 1947, 29 U.S.C. § 141, states in part:

> It is the purpose and policy of this chapter, in order to promote the full flow of commerce . . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Just as a litigant in *Hazel-Atlas* deceived the patent office by fabricated evidence, Great Coastal deceived the National Labor Relations Board in administrative proceedings pertaining to the same strike that is the subject of this case by fabricating evidence of union violence. Just as a litigant in *Hazel-Atlas* invoked in judicial proceedings the patent laws that are designed both to grant a monopoly and advance the public interest, Great Coastal invoked the Labor Management Relations Act, particularly 29 U.S.C. §§ 158(b)(4), 185, and 187. As the congressional declaration of purpose and policy states, 29 U.S.C. § 141, these laws, too, are designed to protect the public as well as litigants.

I therefore conclude that the litigation culminating in the judgment for Great Coastal satisfied the first re-

quirement of *Hazel-Atlas*. This litigation involved more than a controversy between private parties, and the fraud by which it was prosecuted debased the laws enacted to assure the free flow of commerce for the benefit of the public.

IV

The second requirement of *Hazel-Atlas* is best described in the words of the Court, 322 U.S. at 245-46:

> This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here . . . we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.

The unrefuted evidence of the 1979 hearing conducted by the district court and the court's supplementary findings establish beyond doubt that Great Coastal, its officers, and employees engaged in "a deliberately planned and carefully executed scheme to defraud" the National Labor Relations Board, the district court, and the court of appeals. Their fraud was no isolated instance of perjury. To achieve their purposes, the officers and employees created spurious evidence, deceived the Virginia State Police, answered interrogatories under oath untruthfully, filed false affidavits and gave perjured testimony in administrative and judicial proceedings, introduced fabricated exhibits, and filed a corrupt brief and appendix on appeal.

By payments and promises of payments, Great Coastal frustrated discovery of its fraud through the judicial processes afforded by the Rules of Civil Procedure. Moreover, its scheme did not end with the entry of judgment. Like the litigant in *Hazel-Atlas*, it later attempted to forever seal its deception by the payment of large sums of money to the participants in its fraudulent scheme. And, as in *Hazel-Atlas*, it succeeded in cloaking its wrong for several years.

I therefore conclude that this case satisfies the second requirement of *Hazel-Atlas*.

V

Finally, I find no merit in Great Coastal's argument that the fraud did not taint its recovery of damages. While the evidence concerning the secondary boycott was sufficient to sustain a verdict, this issue presented questions for the jury both on liability and damages. As part II of the majority opinion points out, it cannot be said "with complete confidence . . . that the fraud was harmlessly excised from the case." Indeed, the majority opinion states: "We are in complete accord with the conclusions of the district court that 60(b)(3) would have provided relief in this case had the union's motion been timely . . . ."

Great Coastal's argument is similar to the argument rejected in *Hazel-Atlas* that the fabricated evidence was not "basic" to the judgment under attack. 322 U.S. at 246. There the Court did not attempt to appraise the effect of the fraud on the decision making process. Instead, it pointed out that the fraudulent litigant deemed the spurious document to be material. The litigant contrived the fraud to deceive the patent office and the court. The litigant, therefore, was "in no position now to dispute its effectiveness." 322 U.S. at 247.

Great Coastal is in the same posture as the fraudulent litigant in *Hazel-Atlas*. Great Coastal's fraud was conceived and used to deceive the National Labor Relations Board and both trial and appellate courts. The jury that found liability was exposed to the fraud. On appeal Great Coastal argued that violence—which the district court later found was self-inflicted—was inextricably tied in with the secondary boycott. Like the litigant in *Hazel-Atlas*, Great Coastal is in no position to dispute the effectiveness of its fraud.

I would reverse the order of the district court, afford the union equitable relief on its petition filed in this court, and set aside the judgment because, tested by *Hazel-Atlas*, Great Coastal committed a fraud upon the court.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1217

GREAT COASTAL EXPRESS, INC.,
Appellee,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

[Filed Apr. 12, 1982]

/s/ William K. Slate II
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1217

GREAT COASTAL EXPRESS, INC.,
Appellee,

versus

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC.,
Appellant.

No. 81-2073

GREAT COASTAL EXPRESS, INC.,
Appellant,

versus

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC.,
Appellees.

No. 73-2393
No. 73-2448

GREAT COASTAL EXPRESS, INC.,
Apellee-Cross-Appellant,

versus

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC.,
Appellant-Cross-Appellee.

[Filed Jul. 1, 1982]

ORDER

Upon consideration of the petition for rehearing and suggestion for rehearing en banc and, the motion of International Brotherhood of Teamsters for leave to file a reply brief and, the responses to the petition for rehearing,

IT IS ORDERED that:

1. the motion of the International Brotherhood of Teamsters for leave to file a reply brief to the response of Great Coastal Express, Inc. to the petition for rehearing is granted.
2. the petition for rehearing is DENIED. Judge Butzner dissents from the denial of rehearing by the panel.

No member of the court has requested a poll on the petition for rehearing en banc.

For the Court

By Direction.

/s/ William K. Slate, II
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 5-71-R

GREAT COASTAL EXPRESS, INC.,
Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendant.

MEMORANDUM

On the date of June 20, 1972, a jury returned a verdict in favor of the instant plaintiff against the defendant in the sum of $1,300,000.00.

On November 22, 1972, the verdict of the jury as to the amount of damages was set aside, and a new trial ordered, limited to damages. On April 20, 1973, at the conclusion of the trial on damages, the jury returned a verdict in favor of the plaintiff in the sum of $806,093.00. Judgment was entered in accordance therewith, and on appeal, taken by the defendant, the matter was affirmed by the United States Court of Appeals for the Fourth Circuit in an opinion filed April 2, 1975. Thereafter, on December 14, 1978, the defendant filed a motion to set aside the judgment, alleging that the ". . . plaintiff has perpetrated a fraud on this Court, the United States Court of Appeals for the Fourth Circuit and the National Labor Relations Board, causing its own equipment and the equipment of other trucking companies to be damaged by its own employees, and attributing these acts of violence to members of IBT affiliates"; and that ". . . the above-described fabricated acts have culminated in a judgment against the IBT. . . ."

Following extensive discovery proceedings, an evidentiary hearing was held on the union's motion on July 12 and 13, 1979. Thereafter, the Court entered an order denying numerous motions. The union appealed, seeking reversal of the Court's ruling, and thereafter, the United States Court of Appeals remanded the case to this Court with the direction that the Court supplement the record by findings of fact derived from the evidentiary hearing which had been held.

Pursuant to those directions, the Court makes the following findings of fact, incorporating therein, to the end that the Court's findings be read in their appropriate context, reference to certain of the prior proceedings.

At the evidentiary hearing upon the union's motion to set aside judgment for alleged fraud upon the Court, the union presented nine witnesses: (1) Robert G. Seward, a driver for Great Coastal during the strike; (2) Betty Seward, Robert Seward's wife; (3) William P. Funai, Great Coastal's Terminal Manager during the strike; (4) William Stagg, Jr., Great Coastal's Assistant Terminal Manager during the strike; (5) John Martini, a Great Coastal driver during the strike; (6) Samuel Rogers, a Great Coastal driver during the strike, presently employed by Great Coastal; (7) Mack Fifer, a Great Coastal driver during the strike, presently employed by Great Coastal; (8) Edmond Christian Nuckols, Jr., a Great Coastal employee during the strike; and (9) Carmello Thomas Tuminello, Supervisor and Dispatcher for Adley Express during the strike.

No witnesses were called on behalf of the plaintiff.

Charles E. Estes is presently President and owner of Great Coastal, and held those same positions during the strike. During the strike, William P. Funai, the Terminal Manager of Great Coastal, routinely reported any damage of Great Coastal equipment to Estes. Estes personally negotiated the profit-sharing arrangements be-

tween key managerial employees and Great Coastal. Funai was a key managerial employee who had direct supervision over the drivers, with the right to hire and fire drivers. Funai described himself as "the boss" of the terminal; a fact which corroborated the testimony of Seward. The drivers took their instructions directly from Funai, and Funai took his instructions directly from Mr. Estes. Funai was on profit-sharing during the strike, a status reserved by the company for managerial personnel. Funai, according to Great Coastal, was entitled to 2% of all Great Coastal profits in excess of $100,000.00 by virtue of his status as a manager; in fact, he received $12,024.22 as his prorated share of the IBT judgment.

Edward L. Flinn was manager of Great Coastal during the strike, and is presently a manager with the company. As a manager, Flinn, according to Great Coastal, was on profit-sharing during the strike, and was entitled to 2% of all of Great Coastal's profits in excess of $100,000.00. Flinn received $12,731.12 as his prorated share of the IBT judgment.

Robert Williams was Great Coastal's maintenance supervisor and shop foreman during the strike, a position which he presently holds. Williams was part of Great Coastal's management during the strike and was entitled to 2% of all Great Coastal profits in excess of $100,000.00. Williams received $12,822.69 as his share of the IBT judgment.

One morning during the strike William Stagg, Assistant Terminal Manager of Great Coastal, was told by C.E. Estes that he wanted to see Great Coastal's Terminal Manager, William Funai. Stagg, in turn, told Funai, who was at his desk adjacent to Stagg's, that Estes wanted to see him. In response to the message, Funai went directly to the second floor where Estes' office was located. In approximately ten to fifteen minutes, Funai came down the stairs and immediately told Stagg to get the pickup truck and go to Belk Floor Covering to relieve Robert Seward.

Stagg had never before been asked to relieve any drivers during the strike and it was "very unusual" that the request was made in this instance inasmuch as other drivers were idle and available. Nevertheless, in accordance with Funai's instructions, Stagg got in the company pickup truck, and drove to Belk Floor Covering.

On that day, October 23, 1970, Robert Seward was unloading a truck at Belk Floor Covering in the City of Richmond when he was instructed by Stagg to go back to the terminal. Seward got in the pickup truck left by Stagg and went back to the terminal while Stagg finished unloading the trailer at Belk Floor Covering.

Seward went directly to the terminal office and reported to his boss, William Funai, who ordered Seward to get a brick or a rock, to take a truck to West Point, to break out the windshield of the truck and to "tear it up some". Funai and Seward discussed the fact that Seward was "going to break up the truck", was going to "shoot the truck" with a gun, and that Seward should wear gloves because "there might be fingerprints".

As instructed, Seward got a half brick off of the Great Coastal yard and drove a Great Coastal truck to Route 33 off Interstate 64, past New Kent, and pulled off the road. Seward, wearing gloves in an effort to avoid fingerprints, threw the brick at the windshield on the passenger side three times; the brick bounced off the windshield the first two times, but on the third blow crashed through its center. He then fired three shots into the front of the Great Coastal trailer using a small handgun—a cheap .22 caliber "Saturday Night Special".

Seward then proceeded on Route 33 to Green's Restaurant, called the terminal and spoke with Ed Flinn, but rather than tell Flinn the truth, Seward told a contrived story to the effect that unidentified persons had sabotaged the truck. Thereafter, the police arrived and Seward took the officer down the road to a point where a high bank rises from the highway and then levels off into

the woods. Although that was not where Seward in fact had inflicted the damage, Seward, in telling his lie to the police, designated that as the place where a brick had been thrown at the windshield of his truck, where he heard gunshots, and where he saw men running from the bank away from the road through the woods. Later that same day Stagg and the employees at the terminal learned that Seward's tractor windshield had been knocked out and his trailer had been "shot up".

Seward executed a false affidavit concerning the New Kent incident, identified as IBT Exhibit 3. That affidavit was witnessed by Edward L. Flinn, and was specifically incorporated in Great Coastal's answer to IBT Interrogatory No. 14 as "direct evidence of specific instances of violence, intimidation and secondary boycotting activities which are recorded in written statements attached hereto". Great Coastal's answers to IBT's interrogatories were executed under oath by E.C. Estes, Great Coastal's President, and filed with this Court on March 25, 1971.

Seward gave a false affidavit concerning the New Kent incident, identified as IBT Exhibit 4, to a representative of the National Labor Relations Board. Seward also testified falsely about the New Kent incident in a proceeding before the National Labor Relations Board.

Seward was called as a witness for Great Coastal at the trial before this Court on June 15, 1972. He falsely testified that he was driving toward New Kent in October 1970 when a brick came through the windshield on the passenger side, and that he saw men running away through the woods. Seward admitted at the hearing in July, 1979 that he gave perjured testimony before this Court in 1972.

William P. Funai was called as a witness for Great Coastal at the trial before this Court on June 15, 1972 and testified that during the strike he went to West Point, Virginia to look at a Great Coastal truck and saw "[t]he front windshield was broken on it" and there was "a

small hole" in the trailer which looked like it was caused by "a shot, a small caliber gun". When asked in 1972 whether he "saw anybody do anything to that truck", Funai answered, "I seen the damage . . . and nothing else". Funai now concedes that he failed to "tell the truth, the whole truth, and nothing but the truth" in his 1972 testimony; he admits that he failed to tell everything he knew about the New Kent incident to the Court and he therefore violated his sworn oath before this Court. When Funai asked whether he told Seward to sabotage his equipment, Funai refused to answer "on the grounds that the answer might tend to incriminate me".

The Court's conclusion as to Seward's having testified falsely at the first trial is made independent of Funai's exercise of his right against self-incrimination.

Edward Flinn is presently manager at Great Coastal and was also manager at the company during the strike. Some time in 1978 Robert Seward spoke with Ed Flinn at the Great Coastal terminal and told Flinn the truth about the New Kent incident. Flinn stated to Seward that at one time he, Flinn, was trying to trace down the New Kent incident, but someone told Flinn to "lay off" because he was "getting close to something in his investigation". The Court's finding in this regard is admittedly prompted by the absence of any testimonial denial on the part of the plaintiff.

When Local 592 struck Great Coastal in 1970, Adley Express, a trucking company in the Richmond area, enjoyed a greater demand for its services and began hiring extra roadmen who were out on strike against Great Coastal. After the strike began, Ed Flinn, manager of Great Coastal, placed a telephone call to Carmello Thomas Tuminello, dispatcher at Adley. Flinn wanted to know who was in charge at the time, and Tuminello responded that he was. Flinn said, "I'd like to see if you could do us a favor" and asked if Adley was "running any extra road drivers that are out on strike that work at Great

Coastal". When Tuminello responded that Adley was running six or seven of them every night, Flinn asked if Adley "could stop running the roadmen on the road, so we could starve the sons of bitches out and make them come back to work at Great Coastal". Flinn went on to say that this would help Great Coastal "get rid of the union". Tuminello told Flinn that his boss, the terminal manager, who was not there at that moment, said the men were qualified drivers, Adley needed extra men, and he would continue to run them until he had further notice from his own boss.

During the strike Seward was ordered by Funai to go to Adley and East Coast to "punch tires and tear up trucks" [Tr. 40, 95 (Seward)]. Funai handed three "punches" to Seward that were prepared in Great Coastal's maintenance shop and sent him to a motel in Richmond to wait for the other members of the "raiding" party.

That night Seward was met at the motel by three other Great Coastal employees, Sam Rogers, Mack Fifer and Chris Nuckols, and together, upon orders from Funai, they went on a "raid" to Adley, driving to Adley in Nuckols' car. Seward, Rogers and Nuckols punctured tires while Fifer slashed the air hoses off the Adley trucks. Tuminello spotted the four marauders under the Adley trucks while making a yard check, but by the time he returned with assistance, all he found were punctured tires and slashed air lines on the Adley equipment. Tuminello noted that one was wearing a Great Coastal jacket and later recalled the identity of one of them as "Seward".

Thereafter, similar acts of vandalism were conducted by Seward and Nuckols at the East Coast Freight yard. Seward was corroborated in regard to these acts by several witnesses.

During the strike Funai asked Seward to shoot the windows out of the Great Coastal office with an old

double barrel shotgun. Seward declined because there were pickets nearby and the police were also in the vicinity.

Also during the strike, Funai instructed Seward and Chris Nuckols to purchase a slingshot for the purpose of breaking truck windshields. The testimony of Seward in this regard is corroborated by Nuckols. Seward and Nuckols purchased a slingshot from a sporting goods store, and Seward was with Funai, the Terminal Manager, when Funai submitted a ticket to Great Coastal petty cash for reimbursement of the slingshot. Seward and Nuckols tried to use the slingshot in the Great Coastal yard to break the windshield of Great Coastal trucks, but their efforts were to no avail because the shot could not be propelled with sufficient force to damage the windshield glass.

During the strike Martini heard Estes and Flinn express their appreciation to the drivers for their "irritation and agitation" of the pickets. Martini also heard Estes and other officers of Great Coastal express appreciation when Great Coastal trucks would come in damaged. In response to an inquiry from the Court on the attitude of Great Coastal managers about damage to the trucks, Martini testified that when damaged equipment came into the terminal, these officials would say words to the effect that, "this is what we need".

On November 24, 1971, as a result of an election, the National Labor Relations Board decertified Local 592 as representative of the Great Coastal employees. Seward had, at the request of a Great Coastal manager, been active in seeking the decertification of the union.

Within three weeks of Great Coastal's elimination of the union, Estes called Seward into his office and handed Seward $500.00 in cash. At that time, Estes said to Seward, "keep it to [your]self", and told Seward he could "call it a Christmas bonus or pay for a job well done". This $500.00 payment is no where reflected on

the company's books and records. Certain of the company's records for the relevant time period have been destroyed, but Great Coastal's custodian of records has no recollection of the circumstances underlying the destruction of those documents.

Emmett Williamson, Great Coastal's Treasurer and General Manager, testified that during the strike each "managerial" employee who was on profit-sharing with Great Coastal was "reassured by the company that he would receive his agreed percentage of profits if the company were later to recover damages from the union".

Notwithstanding the company policy that a manager on profit-sharing must have been with Great Coastal at the time of recovery against the IBT, William P. Funai, in July 1976—more than five years after Funai had left the employ of Great Coastal—received $12,024.22 ($8,927.99 net after-tax dollars) as his share of Great Coastal's recovery against the IBT.

The Court is satisfied and finds as a fact that much of the testimony offered by the plaintiff in the first trial dealing with the alleged acts of violence by the defendant was perjured.

Just as the perjurors are, regrettably, free from prosecution for perjury by virtue of the statute of limitations, the one year limitation precludes the instant defendant from relief under Rule 60(b)(3) for the reasons stated in the Court's memorandum of February 29, 1980.

Let the Clerk send copies of this memorandum to all counsel of record, and return the records in this cause, along with this memorandum, to the United States Court of Appeals for the Fourth Circuit for such action as it may deem appropriate.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: Aug. 27, 1981

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1217
(No. 73-2393) Related Cases
(No. 73-2448)

GREAT COASTAL EXPRESS, INC.,
Appellee,

—v—

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond
Robert R. Merhige, Jr., Judge

Argued November 13, 1980 Decided December 23, 1980

Before BUTZNER, Circuit Judge, JOE MACDONALD INGRAHAM, Senior Circuit Judge for the Fifth Circuit, sitting by designation, and RUSSELL, Circuit Judge.

Ira R. Mitzner (Barry Wm. Levine, Kenneth M. Simon, Jeffrey M. Johnson, Dickstein, Shapiro & Morin; George Kaufmann on brief) for appellant; J. W. Alexander, Jr. (Blakeney, Alexander and Machen; James M. Minor, Jr., Minor, Marshall, Forb & Batzli, P.C., on brief) for appellee.

PER CURIAM:

The district court, without stating findings of fact, denied a motion to set aside a judgment which was sought on the ground that the judgment creditor had allegedly committed a fraud on the court. The judgment debtor asserts that since the court denied its motion as a matter of law, we must accept as true all of the evidence that was presented at an evidentiary hearing on the motion. It contends that the legal standard of fraud the court adopted was erroneous in the light of this evidence. The judgment creditor did not address the argument that the court's standard was erroneous. Instead, it argues that there was insufficient evidence of fraud to justify setting aside the judgment.

While it is permissible for us to affirm a judgment on grounds that are different from those articulated by the district court, we believe that the absence of specific findings of fact makes such a course improvident in this case. We therefore remand the case to the district court with directions that it supplement the record by findings of fact derived from the evidentiary hearing which it conducted.

REMANDED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 5-71-R

GREAT COASTAL EXPRESS, INC.,
Plaintiff

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendant

[Filed Feb. 29, 1980]

ORDER

For the reasons stated in the memorandum of the Court this day filed and deeming it proper so to do, it is ADUDGED and ORDERED that the motions of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America for relief from judgment and for post-hearing argument be, and the same are hereby denied, and this matter is to be placed amongst the ended causes.

Let the Clerk send copies of this order and the Court's memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: Feb. 29, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 5-71-R

GREAT COASTAL EXPRESS, INC.,
Plaintiff

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendant

MEMORANDUM

The instant controversy between these parties evolves from litigation first commenced in December, 1970 by Great Coastal Express, Inc. ("Great Coastal" or "the Company"), against the International Brotherhood of Teamsters, etc. ("IBT" or "the Union"). As more fully developed, *infra*, the action resulted in a judgment for Great Coastal in the amount of $806,093. The parties are now before the Court on the Union's motion to set aside the aforementioned judgment. Also pending is IBT's motion for further argument in the case.

Great Coastal is an interstate truck carrier based in Richmond, Virginia. At all times relevant to this action the Company's primary business was the shipment of general commodity freight from twenty-six Virginia counties to New Jersey and parts of New York, Pennsylvania and Connecticut. IBT is a labor organization within the meaning of 29 U.S.C. § 152(5).

The Court is of the opinion that post-hearing argument is unnecessary and, accordingly, the Union's motion to that effect must be denied. The issues raised by IBT's motion to set aside judgment have been addressed in post-judgment discovery and the evidentiary hearing which

was conducted on July 12, and 13, 1979. The Union has submitted Proposed Findings of Fact and Conclusions of Law. Great Coastal tendered a Proposed Memorandum decision and draft order. It is thus apparent that the parties have had ample opportunity to present their arguments. While the implications of the Union's motion are grave, the legal issues are fairly settled and additional argument would thus not be of great benefit. The motion to set aside judgment is deemed ripe for disposition and, for reasons which follow, also must be denied.

I. HISTORY OF THE LITIGATION

A full appreciation of the issues presently decided rests upon an understanding of the various stages through which this controversy has progressed.

Prior to the difficulties which precipitated this action, the parties were signatories to the National Master Freight Agreement. Great Coastal's participation under that contract terminated on March 31, 1970. Negotiations between the company and IBT after the expiration of that contract reached an impasse and a strike against Great Coastal was begun in August, 1970.

Great Coastal thereafter commenced suit in the Law and Equity Court of the City of Richmond, Virginia during December, 1970. IBT subsequently removed the action pursuant to 28 U.S.C. § 1441(b) contending that plaintiff's allegations purported to state a claim under sections 301 and 303 of the Labor Management Relations Act, 29 U.S.C. §§ 185 and 187.

The case was tried before a jury on June 14, 15, 16, 19 and 20, 1972. The Company argued that the Union had engaged in two species of illegal strike activity. First, Great Coastal contended that the Union had committed acts of violence, primarily in damaging the Company's equipment. Additionally, Great Coastal argued that the Union had engaged in unlawful secondary boycotting activities.

From the outset, IBT objected to the introduction of evidence concerning acts of violence. Great Coastal was permitted to proceed with evidence of this claim upon the Company's proffer that it would ultimately be linked to the Union. At the close of Great Coastal's case, however, it was apparent that the proffer had not been satisfied. Accordingly, a directed verdict was entered in favor of IBT with respect to all claims arising from the alleged acts of violence.

The claim of illegal boycotting was, however, submitted to the jury. The Company presented its claim through the testimony of its customers and employees, the president of the IBT Richmond Local and an international director of the Union. The jury returned a verdict in favor of the Company in the amount of $1,300,000, an amount which the Court concluded was in excess of that which was proper.

The Union moved for judgment n.o.v.; which motion was denied. The verdict was, however, set aside as being excessive. The Court was also of the view that the jury's award reflected, at least in part, an influence from the evidence of the violence. *Great Coastal Express, Inc.*, v. *International Brotherhood of Teamsters*, 350 F.Supp. 1377, 1380 (E.D.Va. 1972). The Court was not persuaded, however, that the violence evidence tainted the jury's determination of liability for secondary boycotting. *Id.* at 1382.

A second jury trial was held on April 19 and 20, 1973. The sole question in issue was the amount of damages sustained by Great Coastal as a result of the Union's secondary boycotting activities. This jury awarded Great Coastal $806,093 and judgment was entered upon that verdict.

The parties thereafter filed cross appeals in the United States Court of Appeals for the Fourth Circuit. Great Coastal contended that the Court committed error in

granting a directed verdict on the claims arising from the alleged violence. The Company urged this issue upon the Appellate Court conditionally; it sought consideration only if the Fourth Circuit did not affirm the judgment on the secondary boycotting claim. The judgment was affirmed and the question was thus not considered.

Especially relevant for purposes of the instant motion was IBT's contention before the Fourth Circuit that the first jury's determination of liability for secondary boycotting had been infected by the evidence of violence. The Fourth Circuit's opinion in this regard is instructive, although from the Court's view would not, in any event, alter the instant decision.

The Fourth Circuit specifically found that the presumption in favor of the jury's verdict had not been overcome. *Great Coastal Express, Inc.*, v. *International Brotherhood of Teamsters*, 511 F.2d 839, 847 (4th Cir. 1975). The Appellate Court noted that the jury had been instructed not to consider the evidence of violence. The Court further found that the determination of liability was supported by "admitted and abundant evidence." *Id.* The Court also opined that the first jury's excessive award was as likely the result of confusion as it was prejudice from the evidence of violence. *Id.*

The Union's writ of certiorari was denied by the United States Supreme Court, 425 U.S. 975 (1976), and the matter was considered ended until the filing of the instant motion.

II. THE EVIDENTIARY HEARING

Following the completion of post-judgment discovery, the Court held an evidentiary hearing on July 12 and 13, 1979. The most relevant testimony given at this hearing concerned what came to be known as the "New Kent" incident.

The Court heard the testimony of Robert G. Seward, a Great Coastal driver, at the first trial of this matter in 1972. Seward then testified that during the strike he was

driving company equipment near New Kent, Virginia when unidentified persons hurled a brick through the windshield and shot the cab with a small caliber gun. Great Coastal terminal manager William P. Funai testified that he had seen the damaged truck but had no personal knowledge of the incident. This version of the New Kent incident was reported to the police and the National Labor Relations Board, as well.

Seward testified at the evidentiary hearing that his 1972 testimony was false. Seward's present version of the New Kent incident is that he inflicted the damage to the rig upon Funai's direction. The evidentiary hearing also heard Funai admit that a portion of his 1972 testimony was not truthful.

Other evidence was adduced at the 1979 hearing. The additional evidence falls into two categories. First, there was evidence tending to show the Company's reliance upon other perjured testimony or false evidence. Second, there was evidence of fraud unrelated to the instant controversy which was offered for the purpose of showing the Company's motive or intent.

IBT filed the motion presently under consideration; premised on allegations which were supported by the aforementioned evidence. It should be reiterated that the evidence of fraud related to this litigation was entirely concerned with perjury and fabricated evidence. In light of the character of the evidence, and the Court's understanding of the standard for relief, it is unnecessary to address the evidence in greater detail.

The Union's motion is predicated upon allegations of a fraud upon the Court and what are said to be "other reasons justifying relief." In addressing those claims the Court deems it necessary to first consider the scheme of Fed.R.Civ.P. 60(b). To fully explicate the Court's view of the issues involved it will also be necessary to consider Fed.R.Civ.P. 60(b)(3) and the availability of relief by independent action.

III. FEDERAL RULES CIVIL PROCEDURE 60(b)

Rule 60(b) Fed.R.Civ.P. sets forth grounds upon which a party may be relieved from the operation of a judgment. The Rule was amended in 1946 in an attempt to reconcile what has been described as conflicting values. The first is embraced by the doctrine of finality which the law attaches to judgments. Additionally, the amendment sought to recognize and provide a vehicle for relief from judgment in appropriate cases.

The result of the attempt to reconcile the aforementioned values is, not surprisingly, a balancing process. For example, fraud *inter partes*, however it may be characterized, is ground for relief within a year of judgment. Until the expiration of that one year period the second value predominates. Thereafter the balance shifts toward finality.

Rule 60(b) also recognizes the Court's inherent power to set aside its judgment when a fraud has been practiced upon the Court. Here the determinative question involves characterizing the species of fraud presented.

Finally, Rule 60(b) preserves the Court's power to entertain an independent action to set aside the judgment. The independent action rests upon the Court's equitable jurisdiction, *Sayers* v. *Burkhardt*, 85 F. 246 (4th Cir. 1898), *cert. denied*, 172 U.S. 649 (1899) and has long been an accepted part of our jurisprudence. *See e.g., Marine Insurance Company* v. *Hodgson*, 7 Cranch 332 (1813).

A. *Rule 60(b)(3)*

It is readily apparent that the Union's motion could have been embraced by Fed.R.Civ.P. 60(b)(3). That portion of Rule 60 provides:

> On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the

> following reasons: (1) . . . (2) . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party. . . .

A 60(b)(3) motion must be made, however, "not more than one year after the judgment." *Id.* Judgment was entered against IBT in 1973 and affirmed by the United States Court of Appeals for the Fourth Circuit in 1975. The records reflect that the instant motion was not filed until 1978.

The Court may accept the Union's allegations as establishing the use of perjured testimony and false evidence. Relief would be precluded under 60(b)(3) even under that assumption, however, by virtue of the untimely filing of the motion. It may also be questioned whether the Union would have been entitled to relief upon proven fraud raised by timely motion in light of the decisions by this Court and the United States Court of Appeals for the Fourth Circuit that the evidence of violence introduced in the original trial did not affect the determination of liability for secondary boycotting. It is to be noted, however, that the Union's allegations, if factual, relate to a fraud within the purview of Rule 60(b)(3).

B. *Rule 60(b)(6)*

The Union was undoubtedly aware that a Rule 60(b)(3) motion was untimely. It thus, understandably, premised its motion on Fed.R.Civ.P. 60(b)(6) and the fraud which was alleged to have been perpetrated upon the Court. The Court next considers the availability of relief under Rule 60(b)(6).

Subparagraph six authorizes a court to relieve a party from the operation of a final judgment "for any other reason justifying relief." This provision follows the enumeration of five specific grounds for relief and thus may be properly viewed as a residuary clause intended to en-

compass contingencies which could not have been foreseen by the Rule's drafters. 7 J. Moore, *Federal Practice* § 60.27(1). A motion under Rule 60(b)(6) need only be made within a reasonable time.

It thus appears that there are two prerequisites to relief under Rule 60(b)(6). It may be assumed that IBT's motion was made within a reasonable time following the final judgment in this matter. The motion fails to state a proper claim for relief, however, because it does not rest upon "any *other* reason" than those specified in the preceding five subparagraphs of the Rule. (Emphasis added). The allegations of the Union and its proof adduced at the evidentiary hearing demonstrate, at most, grounds for relief under Rule 60(b)(3).

In *Klapprott* v. *United States*, 335 U.S. 601 (1949), the petitioner challenged a judgment, entered by a district court several years earlier, revoking his citizenship. The government contended that petitioner had, at most, shown "excusable neglect" which could be the basis for relief under Rule 60(b)(1), but for the applicable one year limitation. In this regard the Court stated:

> It is contended that the one-year limitation bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but "excusable neglect." And, of course, the one-year limitation would control if no more than "neglect" was disclosed by the petition. *In that event the petitioner could not avail himself of the broad "any other reason" clause of 60(b).* 335 U.S. at 613. (Emphasis added).

See also 335 U.S. at 614-15 where the Court further distinguishes Rule 60(b)(1) to (5) from 60(b)(6). It is apparent that the phrase "any other reason" is to be accorded its usual meaning; especially in light of the fact that it follows the enumeration of five specific grounds for relief. *See also Stancil* v. *United States*, 200

F.Supp. 36 (E.D.Va. 1961) (relief under 60(b)(5) precluded when properly raised under 60(b)(1) but for the one-year limitation) and cases cited at n.18 in 7 J. Moore, *Federal Practice*, § 60.27(1).

IBT previously cited *Stradler* v. *Hall*, 20 F.R. Serv. 2d 531 (4th Cir. 1975) to the Court in connection with a question related to the instant motion. In *Stradler* the Court granted summary judgment in April, 1974 and the Rule 60(b) motion was filed in June, 1974. The Court held that the movant could proceed under both 60(b)(1) and 60(b)(6). It should be noted, however, that the Court in *Stradler* was not presented with the preclusive effect of the one-year limitation of 60(b)(1). It does not, therefore, present a reason for distinguishing *Klapprott*, *supra* and thus does not affect the Court's analysis.

Rule 60(b)(6), on its face, necessitates a ground for relief distinct from those provided in the preceding five subparagraphs. The Court is of the view that IBT's contention must be rejected for an additional reason. Were the Court to afford 60(b)(6) relief in a situation encompassed by 60(b)(3), the one-year limitation of the latter provision would become meaningless. The Court cannot adopt an interpretation which is in obvious conflict with the Rule's framework. The motion under Rule 60(b)(6) thus must be denied.

C. *Fraud Upon The Court*

Fed.R.Civ.P. 60(b) recognizes the Court's inherent power to grant relief from judgment when the Court has been subjected to a fraud. Fraud upon a court is a matter which is so grave that the rules permit relief to be afforded without regard to any time limitation. In fact, a successful movant may be relieved from a judgment procured through fraud upon the court even though the movant has been guilty of laches. *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U.S. 238 (1944). Because

the instant motion falls beyond the one-year limitation of Rule 60(b)(3) it is necessary to consider whether the alleged fraud, as grave as it is, rises to that properly denominated as "fraud upon a court." Failure to make the necessary distinction would, as noted *supra*, emasculate the one-year limitation.

The Court is satisfied that the fraud alleged by IBT would only have been perpetrated upon the Union rather than upon the Court. "Fraud upon the court" should embrace only that species of fraud which interferes with the court's discharge of its judicial functions. The most blatant examples of such fraud are bribery or corruption of the court, its officers or the jury. *See* 7 J. Moore, *Federal Practice*, § 60.33 and cases cited at n.40. A persuasive definition of "fraud upon the court" emphasizes that the term should:

> Embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. Fraud *inter partes*, without more, should not be a fraud upon the court, but redress should be left to a motion under 60(b)(3) or to the independent action. Id. at 515.

Perjured testimony and false evidence obviously interfere with the court's role in discovering the truth. That alone does not, however, "defile the court itself." The above-quoted passage and its analysis is consistent with the views of many of the Circuit Courts of Appeal. *Pfizer, Inc.*, v. *International Rectifier Corporation*, 538 F.2d 180 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977); *Vandervoort* v. *Vandervoort*, 529 F.2d 424 (5th Cir. 1976); *Wilkin* v. *Sunbeam Corporation*, 466 F.2d 714 (10th Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973); *Kupferman* v. *Consolidated Research and Manufacturing Corporation*, 459 F.2d 1072 (2d Cir. 1972); and *Kenner*

v. *Commissioner*, 387 F.2d 689 (7th Cir.), *cert. denied*, 393 U.S. 841 (1968). The Court has been unable to find, and neither party has cited, a case decided by this Circuit expounding upon the phrase "fraud upon the court." The Court, based upon its reading of the precedent, is satisfied that this Circuit would also find Moore's discussion persuasive.

The Union has urged *Hazel-Atlas*, *supra* upon the Court as the legal basis for finding that the alleged fraud would be remediable. *Hazel-Atlas* evolved from a patent infringement suit commenced by Hartford-Empire. Hartford-Empire officers, with the participation of their attorney, fraudulently secured false evidence which was relied upon in obtaining the patent in question and in prosecuting an appeal before the Seventh Circuit. The Court held that the Circuit Court had inherent power to set aside its judgment as well as that entered by the district court pursuant to the Circuit Court's remand.

Although the dicta of *Hazel-Atlas* is sufficiently broad to encompass the fraud alleged in the instant matter, the actual situation there presented is distinguishable. The fraud of *Hazel-Atlas* included the participation of the Hartford-Empire attorney—an officer of the court. *Hazel-Atlas*, viewed in this light, is consistent with the formula advance by Moore. In fact, the court stated:

> This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. *Id.* at 245.

The Court has reviewed IBT's proposed findings of fact and conclusions of law and has found nothing therein advocating a finding by the Court that would implicate Great Coastal's attorneys in the fraud, nor indeed has any evidence leading to such a conclusion been introduced. There is thus no basis for finding a fraud upon the Court. Indeed, much of the *Hazel-Atlas* dicta relied upon by IBT related to the court's power to grant relief *once*

it has been shown that a fraud was perpetrated upon the court.

Applying the *Hazel-Atlas* dicta in accordance with IBT's interpretation of the opinion would require the Court to conclude that *Hazel-Atlas* overruled or modified its precedent, *sub silentio*. It is clear that this was not the Court's intent for *Hazel-Atlas* was said to rest upon "settled equitable principles." 322 U.S. at 247. Neither the fact that the fraud involved a scheme or affected a broader public interest than merely the outcome of the litigation are alone sufficient to justify the *Hazel-Atlas* decision nor afford relief in the instant case. Those factors are presented in *Throckmorton*, *infra* and yet relief was denied.

In short, the Court is of the opinion that the participation of the attorney, an officer of the court, was the impetus for elevating fraud *inter partes* to a fraud upon the court. The Union having shown at best fraud *inter partes* is not entitled to relief upon this basis.

D. *The Independent Action In Equity*

Fed.R.Civ.P. 60(b) "does not limit the power of a court to entertain an independent action to relieve a party from judgment. . ." A motion under Rule 60(b) may properly be treated as the commencement of such an independent action. *H. K. Porter Company* v. *Goodyear Tire and Rubber Company*, 536 F.2d 1115 (6th Cir. 1976); *Bankers Mortgage Company* v. *United States*, 423 F.2d 73 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970). While not treated as such by IBT, the Court has considered whether the Union's allegations and proof provide a sufficient ground for relief. Here, too, the dispositive issue is the type of fraud which will support an independent action.

In *United States* v. *Throckmorton*, 98 U.S. 61 (1878), it was contended that a predecessor in title had perfected same through a fraudulently antedated document show-

ing a grant from the Mexican government. In resolving the controversy the court was required to balance the competing values of finality of judgment and preventing a party from benefiting from his fraud. The court held that only extrinsic fraud, and not intrinsic fraud, would support an independent action to set aside a judgment.

The court noted that whether in law or equity, a direct appeal lies to correct errors of both the court and the jury. Finality of judgment is not disturbed since the review is a continuation of the original action. But after the exhaustion of foreclosure of direct review, the challenge to the judgment is no longer part of the original suit and, hence, finality must be afforded some measure of protection.

At that point finality is given the highest priority under all but exceptional circumstances, because:

> The mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses . . . would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases. 98 U.S. at 68-69.

The exception for which finality is superseded by individual justice is, in the case of fraud, extrinsic fraud.

Extrinsic fraud, while often difficult to distinguish from intrinsic fraud, is characterized as a fraud collateral to the issues before the court. It would include, *inter alia*, a party keeping his adversary or his witnesses away from court, a false promise of compromise or the breach of any attorney's loyalty to his client. The aforementioned examples of extrinsic fraud share a common denominator which justifies the exception: Extrinsic fraud prevented there ever being an adjudication of the issues joined.

The Union's allegations relate merely to the possible commission of intrinsic fraud by Great Coastal. The

Company's fraud would have related to the matters in controversy, *i.e.*, the violence claim. Nor can it be said that any effort by the Company to conceal the fraud and hence, evidence suitable for impeachment, prevented a true adjudication of the issues. To adopt that reasoning would permit the exemption to swallow the rule.

It has been suggested that *Throckmorton, supra* was expanded to include intrinsic fraud in *Marshall* v. *Holmes*, 141 U.S. 589 (1891). In this regard, the Court notes that the *Marshall* case may strictly be cited only for its ruling on removal procedure and aggregation of claims for purposes of federal jurisdiction. The discussion pertaining to fraud was mere dictum.

The Court does not share the commentator's concern over the *Marshall* dicta and its effect upon the vitality of *Throckmorton*. The passage which created the apparent conflict quotes *Marine Insurance Co., supra* at 336 stating:

> It is the settled doctrine that "any fact which clearly proves it to be against conscience to execute a judgment, *and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud* or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." (Emphasis added). *Marshall, supra* at 596.

The Court is of the view that the emphasized portion, which is conjunctive with the unconscionability element, comports with the notion of extrinsic fraud and is thus not inconsistent with *Throckmorton*.

Of greater import is the decision of *Aetna Casualty & Surety Company* v. *Abbott*, 130 F.2d 40 (4th Cir. 1942). In *Aetna* the rule was set forth for this Circuit:

> Even if the language be construed as charging that the judgment sued on was procured by means of perjured testimony, this would not be sufficient; for it is well settled that this constitutes no ground upon which the court could disregard the judgment or deny its enforcement in an independent proceeding. *The frauds which justify such action in an independent proceeding between the same parties or their privies are those which are extrinsic or collateral to the matter tried, and not frauds, such as perjured evidence,* which were "actually presented and considered in the judgment assailed." *United States* v. *Throckmorton*, 98 U.S. 61, 66. (Emphasis added, other citations omitted).

The Union having shown at best intrinsic fraud, may not prevail in an independent action to set aside the judgment in this case.

IV. CONCLUSION

For the aforementioned reasons, the Court concludes that IBT is not entitled to the relief it seeks. Assuming arguendo that the allegations of fraud are factual, it is clear that Rule 60(b)(3) would have been an appropriate vehicle for seeking relief. As the Court has already indicated, relief under Rule 60(b)(3) is, however, foreclosed at least on account of the one year limitation. Fraud embraced by Rule 60(b)(3) may not be considered a proper basis for relief under Rule 60(b)(6). The Union's allegations can neither be characterized as contending that a fraud was committed upon the Court, nor as the perpetration of an extrinsic fraud. IBT's motion for relief from judgment must, therefore, be denied.

An appropriate order shall issue.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: Feb. 29, 1980.

APPENDIX F

UNITED STATES DISTRICT COURT
E. D. VIRGINIA
RICHMOND DIVISION

Nov. 22, 1972

Civ. A. No. 5-71-R

GREAT COASTAL EXPRESS, INC.,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC.

James Minor, Jr., Richmond, Va., J. W. Alexander, Jr., Charlotte, N. C., for plaintiff.

Raymond L. Bergan, Paul Martin Wolff, Earl C. Dudley, Jr., Washington, D. C., for defendant.

MEMORANDUM

MERHIGE, District Judge.

The International Brotherhood of Teamsters (hereinafter "Union"), pursuant to Rule 59, Federal Rules of Civil Procedure, has moved the Court for judgment *non obstante veredicto* (N.O.V.), as a consequence of a jury verdict rendered against it in excess of one million dollars. Both parties have exhaustively briefed the issues raised by the Union's motion, and it is upon said briefs and the record before it that the Court finds these matters ripe for disposition.

The plaintiff, a freight trucking corporation, originally brought suit in the Law and Equity Court of the City of Richmond in December of 1970, against the Union for alleged damages accruing from a protracted strike, ac-

companied by alleged widespread union violence and secondary boycotting. The original State court motion for judgment demanded $3,500,000 compensatory damages and $2,500,000 punitive damages. The defendant Union removed that action to this Court invoking jurisdiction pursuant to §§ 301, 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. §§ 185, 187, and the removal statute, 28 U.S.C. § 1441(b). A jury trial was demanded.

In November 1971 the plaintiff submitted a trial brief whereby it specified causes of action for compensatory and punitive damages under LMRA § 303 (29 U.S.C. § 187) and the common (tort) law of Virginia respectively. In response, the Union's trial brief raised issues with respect to the § 303 claim, which issues are the gravamen of the present motion, and averred that plaintiff's common law tort claim was not substantiated by a clear showing of the International Union's (defendant) participation in the alleged tortious activity as required by § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106 and United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1965).

Upon completion of plaintiff's case at trial, the defendant Union moved for a directed verdict. The motion was granted with respect to the violence (common law) claim, the Court having concluded that the plaintiff had not sustained the burden of producing a clear showing of the defendant's participation in that regard as required by the statutory law and the principles of *Gibbs, supra.*

A directed verdict for the Union with respect to the secondary boycott claim was, however, denied. The Court, though satisfied that the oral testimony adduced was insufficient to sustain a finding of agency between the strikers and the defendant Union, concluded that it was bound as to that issue by the principles enunciated by its appellate court in the case of International Brotherhood of Teamsters v. United States, 275 F.2d 610 (4th Cir.

1960), discussed *infra*, and accordingly permitted the secondary boycott claim to go to the jury.

Upon summation to the jury, plaintiff's counsel averred that it had shown actual damages proximately resulting from the alleged secondary boycotting in the amount of $942,065.00. In the course of its deliberations, the jury inquired of the Court, "What amount of damages lost in dollars is the plaintiff asking? Is it the $942,065 figure?" After colloquy with counsel, the Court instructed the jury, "The direct answer to that inquiry is yes . . . I must tell you that you are not to concern yourselves with what the plaintiff asks for unless it coincides with the evidence as you find it." The jury subsequently returned a verdict for $1,300,000.00.

The Union has predicated its motion for judgment N.O.V. on a number of grounds, many of which deal with matters best left for appellate review.[1] The Court is duty bound, however, to consider several of the issues raised thereby, which may be delineated as follows:

1. Was there a requisite showing of agency made by the plaintiff by which the defendant, the parent union, could be held accountable for acts of its members and/or local affiliates?

2. Was the jury finding of damages made in accordance with the mandate of LMRA § 303?

3. Were charges to the jury of such a contradictory nature so as to be confusing or otherwise an impediment to impartial jury deliberation?

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[1] The defendant has averred that insufficient evidence of secondary boycott activities was presented to sustain a jury verdict therefor. Much of defendant's contention rests upon the proper legal definition of the secondary boycott alleged here. The Court is of the opinion that its determination of these legal issues is clearly set forth in the jury charge and that factual determinations with regard to proof of alleged illegal activity were properly made by the jury. Except for the question of contradiction in said charges, the Court will not consider that issue.

Considering these issues in turn, the Court concludes as follows:

I.

The labor dispute at issue here began as a wildcat strike and was subsequently adopted by three Teamster locals. The defendant admits supplying strike benefits to its members and to providing $10,000 to the depleted treasury of one of the locals involved. The defendant also admits that one of its officers solicited help for the locals involved from its other, non-involved affiliates. The defendant with some force asserts that the above acts do not establish the requisite agency on which to predicate liability for illegal strike activities. The Court's initial inclination to sustain these contentions was, as heretofore stated, precluded by its interpretation of the rule of International Brotherhood of Teamsters v. United States, *supra*, (hereinafter "IBT"). Upon restudy of this matter and of the *IBT* case, the Court concludes that *IBT* binds the Court to the determination that requisite agency was here present.

In that case, a criminal contempt action was brought against the present defendant. The defendant therein challenged the service upon an officer of a union local, contending that said service was ineffective against the defendant International Union. The issue thus formed was whether the local officer was properly an agent of the International Union. In making its determination, the Court of Appeals for this circuit closely examined the constitutional provisions of the defendant's charter. Based upon a thorough examination of the provisions of that constitution, in an opinion by Judge Haynsworth, the Court stated that to find that the local official was not an agent of the parent union could not "be squared with realism." This conclusion was based on the parent's far-reaching control of the local, as shown by the provisions of the International Constitution bearing upon such con-

trol of many details of its business and operations. The Court further concluded that its finding was buttressed by the fact that the local involved therein was then under trusteeship. It appears from the Court's reasoning, however, that the status of trusteeship was not, as defendant has argued, the determinative factor in the Appellate Court's conclusion.

Because the Teamsters ratified a new Constitution in July 1966, (after *IBT* but prior to the event complained of here), the Court must determine whether the new provisions would result in determinations in accord with those in *IBT*. The provisions with regard to membership are similar. People eligible to be local members are automatically eligible to be International members. Exceptions to this rule may be made by the International's General President. As in *IBT*, the International's Constitution prescribes monthly local meetings and the rules of procedure therefor. The General President or General Secretary-Treasurer of the parent union has the power, upon approval of the General Executive Board, to revoke a local charter. Local charters are issued by the parent union. The Trusteeship provisions are also similar. More important, as in *IBT*, the International must approve contemplated job actions by local affiliates, and has the power to override local executive board decisions with respect to acceptance of contract terms and job actions by directly submitting the issue to a vote of the local. Without making further detailed findings as to the specific operations of the International-local framework, it will suffice for the Court to state that the two constitutions are so similar as to bring the current set-up within the rationale of *IBT*.

The Court must conclude, therefore, that as a matter of law the jury was entitled, upon appropriate findings of fact, to impute the actions of various locals and individual members to the parent union.

II.

The Union claims that the jury determination as to damages is violative of the LMRA § 303, upon which the Union's liability is founded. The Court concludes that this view is well taken.

The Supreme Court made clear in Local 20, Teamsters' etc. Union v. Morton, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964), that § 303 is addressed only to illegal strike activity and that any liability predicated upon that section must be confined to actual, compensatory damages. Punitive damages are not within the contemplation of that section.[2] The damages must flow from injuries proximately caused by the illegal secondary activities under § 303.

Upon trial, the plaintiff's counsel in argument claimed to have shown actual damages resulting from the secondary boycotts in the amount of $942,065. As the above-recited facts indicate, the jury was well aware of this figure. Nevertheless it returned a verdict of $1,300,000. The Court is aware that "once the fact of damage has been properly shown, 'uncertainty as to their amount will not foreclose recovery.'" Riverside Coal Co. v. U. M. W., 410 F.2d 267 (6th Cir. 1969). The Court is also cognizant of the fact that the protracted length of the strike here involved (seven months) as well as the widespread geographical union strike activities make it extremely difficult to establish an exact figure for actual damages, and that accordingly, the jury is given some latitude under *Riverside Coal*. Nevertheless, the damage award here was substantially out of touch with damages allegedly proven. Although the plaintiff has sought to justify the award here with further figures of subsequent business losses,

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[2] Punitive damages for non-peaceful secondary activity may be awarded on a state claim under pendent jurisdiction. See UMW v. Gibbs, *supra*. However, in this action the plaintiff failed to sustain a state law cause of action.

that evidence was not before the jury. Under *Morton, supra*, this award cannot be left to stand.

The Court is of the further opinion that the jury, while well intentioned, was in spite of the Court's instructions to the contra influenced in its consideration of damages by the gross and vicious conduct attributed to the members of the local union and their sympathizers. This is reflected in its verdict which exceeded even the claims of plaintiff's persuasive advocate by more than $300,000.00.

The question remains, therefore, as to the appropriate remedy. While there is proper precedent under § 303 for a remittitur up to 40%, see Gulf Coast Bldg. & Const. Tr. Council v. Hoar & Son, 370 F.2d 746 (5th Cir. 1967), the Court concludes that in this case, owing to the complicated nature of the damage question, that a remand for new jury determination as to damages is appropriate. See Carpenter's Local 1273, etc. v. Hill, 398 F.2d 360 (9th Cir. 1968).

III.

The Union alleges that portions of the jury charge were of such a contradictory nature as to be improperly confusing to the jury. Specifically, it alludes to the two passages, denoted by brackets below, which deal with the definition of the strike activities complained of. The Court has contextualized these passages by adding intervening portions of the charge:

> [The other type of legal primary activity, strike activity, is called roving or ambulatory picketing. Now, this type of picketing permits the union to picket beyond the terminal, warehouse, or other buildings belonging to Great Coastal. It allows the union to follow and picket Great Coastal trucks while they make pickups and deliveries. And in this type of picketing the union must conform to certain rules. Briefly summarized these rules permit the union to picket at the time when a Great Coastal truck may

be located on the premises of a Great Coastal customer and is engaged in its normal trucking business at its customer's place of operation.

The rules permit picketing by the union providing such picketing is reasonably close to the Great Coastal truck and permits picketing where a Great Coastal truck is present at the premises of a Great Coastal customer provided the union discloses that its dispute is only with Great Coastal and not its customer.

Now, you heard a great deal of testimony and discussion and argument about the legality or illegality of ambulatory picketing. About whether that picketing is rendered illegal if the union hopes that the employees of Great Coastal's customers will honor its picket lines. You are specifically instructed that the ambulatory picketing is not in and of itself illegal. *Nor is it rendered illegal by the fact that the union may have hoped and desired that the employees of Great Coastal's customers would honor the picket lines.* Ambulatory picketing, which is confined as reasonably as possible to the vicinity of the Great Coastal truck and to the time when the Great Coastal truck was present on the premises is presumptively legal.] (Emphasis supplied by defendant.)

* * * *

Section 303(a), 29 U.S.C.A. 187(a) provides, and I quote, "It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 158(b)(4) of this Title."

Section 158(b)(4) defines an unfair labor practice as follows: *"It shall be unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage any individual employed by any*

person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, *where in either case an object thereof is (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person,* or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this Title: provided, that nothing contained in this clause shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." (Emphasis supplied by Court).

• • • •

[The words "induce or encourage" are broad enough to include in them every form of persuasion. Pickets and picket signs are a form of persuasion used by unions. And if you find that the union picketing at places of business of the plaintiff's customers was intended to appeal to employees of those customers to induce or encourage them to engage in strikes or refusal to handle the plaintiff's freight, and if you further find that one of the objects thereof was to cause such customers to cease doing business with the plaintiff, you will answer the first issue yes.

• • • •

In determining any issue involving the intent or object of the union you may consider all the facts and circumstances in evidence in the case which may aid the jury in its determination of the states of mind of the union's representatives in this case.

The Court tells you it is not necessary that the evidence in this case establish that the only object or purpose of intent of the defendant union with respect to the employees or persons doing business with the plaintiff was to require or force them to cease doing business with the plaintiff. A labor organization may have many different reasons for communicating or dealing with the employees of a business concern, and all of these reasons may in varying degrees prompt the conduct of the union with respect to such employees. It is sufficient if one of the objects or purposes of the defendant union in any communication or dealing with the employees of customers or the plaintiff was to require or force such customers to cease doing business with the plaintiff.]

The Union alleges that the two bracketed portions cannot be reconciled. Upon proper contextualization of these passages, the Court disagrees. The first bracketed passage deals with the definition of *primary* ambulatory picketing and states that legal primary picketing is not rendered illegal by union members' ultimate desires. See Local 761 IUE v. NLRB, 366 U.S. 667, 81 S.Ct. 1285, 6 L.Ed 2d 592 (1961). The second bracketed passage is a definitional discussion of § 303(a) which proscribes, *inter alia*, *secondary* picketing. See *Local 761, IUE, supra.* The two passages are uncontradictory. Any ambivalence which is produced by the juxtaposition of these passages is merely caused by the fact that, "Important as is the distinction between legitimate 'primary activity' and banned 'secondary activity' it does not present a glaringly bright line." *Local 761, IUE, supra,* at 673, 81 S.Ct.

at 1289. The Court is satisfied its statement of the law as given to the jury was accurate.

The defendant takes exception as well to jury charges on the question of damages. In light of the Court's aforementioned determination in that regard, said exceptions are rendered moot.

The motion for judgment N.O.V. will be denied. The Court will strike the jury award on damages and direct a retrial solely as to that issue.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 73-2393, 73-2448

GREAT COASTAL EXPRESS, INC.,
Plaintiff-Appellee-Cross Appellant.

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association,
Defendant-Appellant-Cross Appellee.

Argued April 3, 1974

Decided Jan. 21, 1975

Sidney Dickstein, Washington, D. C. (George Kaufmann, Anthony F. Troy, Ira R. Mitzner and Dickstein, Shapiro & Morin, Washington, D. C., on brief), for defendant-appellant in No. 73-2393 and for plaintiff-appellee in No. 73-2448.

J. W. Alexander, Jr., Charlotte, N. C. (James M. Minor, Jr., Richmond, Va., and John O. Pollard, Charlotte, N. C., on brief), for plaintiff-appellee in No. 73-2393 and for defendant-appellant in No. 73-2448.

Before RUSSELL, FIELD and WIDENER, Circuit Judges.

WIDENER, Circuit Judge:

This suit, originally filed in a Virginia state court, was removed to federal district court pursuant to 28 U.S.C.

§ 1441(b) as a claim arising under §§ 301 and 303 of the Labor Management Relations Act, 29 U.S.C. §§ 185 and 187.

This appeal results from two jury trials in which the appellant-defendant union, International Brotherhood of Teamsters, etc. (IBT), was found to have been responsible for damages resulting from illegal secondary boycotts conducted by three of its local unions in violation of 29 U.S.C. § 158(b)(4).

The employer, Great Coastal Express, Inc. (the company), contended throughout both trials that all of its damages, alleged to be $942,065, resulted from the illegal acts of IBT because the company had not suffered damage until IBT supplemented its legal tactics with illegal ones. The first jury returned a general verdict against IBT for $1,300,000, which the district court set aside on IBT's motion for judgment *non obstante veredicto*, or in the alternative for a new trial, as being excessive. See 350 F.Supp. 1377 (E.D.Va.1972). A new trial was ordered to reconsider the issue of damages, and the verdict reached at the second trial was for $806,093, upon which the district court entered judgment.

IBT contends on appeal that the court wrongfully allowed the issue of whether or not the local unions, and their officers and members, were the agents of IBT to go to the jury in the first trial; that the company should not recover any damages because it failed to particularize its losses to those caused by illegal activity as distinguished from losses caused by legal union activity; that the court erred in restricting the second trial to damages; and that the instructions to the second jury were erroneous. For reasons which follow, we affirm the judgment of the district court. Because of our resolution of the case, it will not be necessary to reach the issue of the violent conduct of the unions raised on cross appeal by the company.

The company is an interstate truck common carrier, based in Richmond, whose business consists primarily of transporting general commodity freight from twenty-six Virginia counties into New Jersey and parts of New York, Connecticut and Pennsylvania. The company had been a party to the National Master Freight Agreement with IBT from 1964 until expiration of the 1967 contract on March 31, 1970. The parties reached an impasse during negotiations for a new contract, and the company refused to become a party to the new National Master Freight Agreement. Richmond Local 592 applied for strike benefits from IBT on August 6, 1970 and went on strike August 9, 1970. IBT approved payment on the strike benefits on August 10, 1970, and, on August 13, Local 107 in Philadelphia and Local 641 in Jersey City, New Jersey also went on strike against the company. Retroactive strike benefit payments were also approved by IBT for the latter two locals. All three locals were striking over the company's refusal to become a party to the National Master Freight Agreement, and no contention is made that the cause for the strike was not quite a legal reason.

The strike initially had little or no effect on the company. It was able to continue all its operations by using office employees, salesmen, supervisors, and newly-hired replacement drivers. Employees not on strike willingly crossed union picket lines at Richmond, and the company began making direct pickups and deliveries in its northern territories so that the picketed Jersey City terminal was practically unused. At the end of the seven or eight month continuance of the strike, however, the company's freight-hauling business had been effectively shut off. The argument between the parties is over the legality of a roving picket operation, and the extent to which illegal secondary boycott activities damaged the company.

The company's attack in the first trial was two-pronged, in that it sought damages for alleged secondary boycott

activities in violation of LMRA § 303, 29 U.S.C. § 187, and also damages for various alleged acts of violence and sabotage. At the close of the company's evidence, the court granted defendant's motion for a directed verdict as to the violence aspect of the case, holding that the burden of proof for finding IBT liable for acts of violence committed is the higher standard of proof of clear and convincing evidence, rather than a preponderance, and that the company had failed to meet this higher standard. See U.M.W. v. Gibbs, 383 U.S. 715, 735, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), construing Norris-LaGuardia Act, § 6, 29 U.S.C. § 106.

We should say here, and we emphasize, that the union does not contest the fact that there was evidence from which a jury could find an illegal secondary boycott. Indeed, the matter is admitted to be clearly a jury question. And the matter having been decided in favor of the plaintiff under proper instructions, it is, in all events, removed from our consideration. Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946). The only question before us as to that finding is whether or not a partial new trial was proper.[1]

The company offered evidence as to illegal secondary activities by representatives of customers it had serviced during the strike, and drivers it had hired to replace the strikers, as well as from its own executives and other employees and the president of the Richmond local and an international director of the union.

The principal witness concerning the amount of the company's damages was a Certified Public Accountant, Lepp, who testified that he had worked with Great Coastal for several years and had examined the books of

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[1] There is a question of some consequence as to whether or not this argument was properly presented to the district court so that it might be argued here. McGowan v. Gillenwater, 429 F.2d 586 (4th Cir. 1970). We do not reach this procedural question.

Great Coastal for periods before, during and after the strike. Lepp stated that he noted a disruption in the company's general pattern of receipts and profits after the strike started. On the basis of the company's business growth pattern and operating ratio over a period of time prior to the strike, Lepp projected a figure of anticipated profit during the seven months of the strike as being $322,438. He added to this the actual loss incurred by the company during the strike, $274,895, to reach a total damage figure of $597,333 during the strike. Lepp then computed a projected profit figure of $495,715 for the period from the end of the strike to the end of 1971, subtracted $150,983 actual profit which the company showed in this post-strike period, and added the additional damage figure of $344,732 to $597,333 in arriving at the total damage estimate of $942,065.

The key witness for IBT with respect to union activity after the strike began was William A. Hodson, president of the Richmond Local No. 592. Hodson testified that he generally was in charge of the strike, and was personally involved in the picketing on occasion. The union began utilizing roving, or ambulatory, pickets to follow company trucks to customer business locations, and Hodson testified that these pickets were assigned on a weekly basis to go throughout the company's territory. All of the roving pickets' expenses were paid, in addition to strike benefit payments, by the union. Hodson testified that over $49,000 in strike benefits were paid, and that Local 592 had also received $10,000 from IBT, $10,000 from the Eastern Conference of IBT, and $2,500 from various Joint Councils of IBT, apparently in addition to authorized strike benefits, to further assist in financing the strike.[2] Hodson sent a letter to all of the company's cus-

[2] Although the matter is unclear from the evidence presented, the $49,000 figure apparently includes all union monies, from whatever source within the union, expended on the strike. IBT records introduced in evidence show that it paid $24,160, as authorized strike benefits, to individual strikers.

tomers, advising them that Local 592 was on strike against Great Coastal because of its unfair labor practices, expressing a desire to lawfully picket on their premises when Great Coastal trucks were present, and requesting their cooperation during the strike. He further testified that a purpose of the roving pickets was to receive assistance or cooperation from the company's customers, and that he had complained to IBT about sister Teamster locals, not employed by the company, who refused to respect their picket lines. At the first trial he admitted that a purpose of the roving pickets was to induce employees of Great Coastal customers not to unload Great Coastal freight, and at the second trial he admitted such was their primary purpose. Taken as a whole, Hodson's testimony left little doubt that Local 592 tried to get all IBT local unions, whether they represented Great Coastal employees at other locations or not, to assist in this strike in refusing to unload Great Coastal freight, and that non-teamster unions had also been asked to help.

Evidence, in addition to Hodson's testimony, indicated that Local 592 kept close contact during the strike with both the Eastern Conference of IBT and IBT headquarters itself, and that almost all of Local 592's requests for assistance, financial or otherwise, were complied with. IBT was advised on numerous occasions of the existence of the roving pickets. On one occasion, Eastern Conference director and IBT director and vice president Trerotola wrote to over 100 other teamster locals advising them that the roving pickets had not been entirely successful and requested any assistance they could legally give. He enclosed a list of Great Coastal customers.

The gist of Trerotola's testimony as to IBT's involvement and assistance during the strike may be summarized in short order: Trerotola stated consistently that he was a busy man, that it was his signature on various letters written to Local 592 and IBT, but that he did not specifically recall signing the letters because of the bulk of

correspondence his office receives and the fact that he delegates many responsibilities. He said the Eastern Conference may have assisted Local 592 in getting various correspondence mailed and in obtaining contributions to its strike fund; that IBT often asked other unions to help in any way they could; and that he had requested only lawful assistance from other teamster locals. He said he had no knowledge of any illegal secondary activity in connection with this strike.

The district court's opinion on the motion for judgment *non obstante veredicto* following the first verdict of $1,300,000 is reported at 350 F.Supp. 1377. IBT raised the same issue in that motion as here with respect to whether the company had made the requisite showing of agency, and also argued that the jury charges were contradictory, and that the jury had awarded punitive damages in violation of the Labor Management Relations Act, § 303. The court relied on the case of International Brotherhood of Teamsters v. United States, 275 F.2d 610 (4th Cir. 1960), in concluding that there had been a sufficient showing of agency to let the jury consider it. The court also ruled against IBT on the jury charge issue, but did hold that the excessive verdict of damages was partially caused by the jury's consideration of the gross and vicious conduct attributed to the members of the local union and their sympathizers. The court stated the damage question was complicated and concluded a remittitur was improper. The motion for judgment N.O.V. was then denied, and a retrial ordered on the issue of damages.

At the second trial, the company relied primarily on testimony of its president and vice-president, who testified at length concerning the deterioration of company business and loss of customers, and Lepp's testimony concerning the $942,065 damages claimed. IBT called no witnesses. Pertinent exhibits from the first trial were introduced by both sides for the jury to consider in arriving at damages. The company again took the position that

no damage had been caused until the unlawful secondary boycott commenced. A part of the uncontradicted evidence was that numbers of freight shipments went undelivered because of the illegal secondary boycott actions. The jury concluded that the company had proved damages of $806,093.

IBT's first contention, that the court should have ruled as a matter of law that there was insufficient evidence for the jury to find an agency relationship between it and the striking local unions, is without merit. The Supreme Court has recognized, in suits brought under the LMRA § 303, that the responsibility of a union for the acts of its officers and members "is to be measured by reference to ordinary doctrines of agency." United Mine Workers v. Gibbs, 383 U.S. 715, 736, 86 S.Ct. 1130, 1144, 16 L.Ed.2d 218 (1966). This court has previously held, in another context (a criminal case with its more stringent burden of proof), that the IBT constitution provides for such far-reaching control of local unions that the locals, in essence, are not autonomous but are subdivisions of IBT. International Brotherhood of Teamsters v. United States, supra, 275 F.2d at 614. The district court here compared the constitution in effect when the *Teamsters* case was decided, found no significant differences, and concluded, quite correctly, that under the evidence in this case the jury was entitled to decide the issue. 350 F. Supp. at 1379. That being so, the issue is closed, for the weight of the evidence and the credibility of witnesses is solely within the province of the jury. A. & G. Stevedores v. Ellerman Lines, 369 U.S. 355, 358-359, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962); Lavender v. Kurn, 327 U.S. 645, 652-653, 66 S.Ct. 740, 90 L.Ed. 916 (1946). IBT claims no error as to the evidence admitted, which was ample to show participation by IBT, or in the jury charge, so the jury's finding of an agency relationship must stand.

The above discussion as to agency applies in large part to the jury finding that IBT had committed illegal secon-

dary acts. As stated before, the defendant admits this was a jury question. The court, at the first trial, very carefully charged the jury as to the law concerning secondary boycotts, and IBT does not contest the charge on appeal. From the testimony and other evidence recited, it goes without saying that the jury had abundant evidence to find that IBT had induced, encouraged, threatened, or coerced employees of Great Coastal customers to withhold the labor from their employers, with whom they had no dispute, and that IBT so acted for the purpose of achieving the unlawful objectives set out in the National Labor Relations Act, § 8(b)(4), 29 U.S.C. § 158(b)(4). The record also contains abundant evidence from which the jury could have found, as it obviously did, that almost every truck of Great Coastal was followed by roving pickets from the inception of the strike; that initially they were to little or no avail; that after requests of Trerotola and Hodson were made to the other unions the roving pickets became almost completely effective because the employees of the consignees would not accept delivery from Great Coastal; and on account of the illegal secondary boycott activities Great Coastal was damaged.

The thrust of IBT's complaint concerning the second trial, though, is not the sufficiency of the evidence, but that the company should have separated union activity that was clearly lawful, and for which no damages could be had, from the alleged unlawful activities, and thus established the proximate cause of its damages with more specificity. The company's theory throughout both trials was that it had suffered no damages at issue here because of lawful union activity, but that all of such damages resulted from IBT's unlawful acts which ultimately shut down business entirely.

What IBT does not take into account is that at the second trial, the trial judge, out of an abundance of precaution, submitted not only the amount of damages, but also the proximate cause thereof to the jury. Thus, there

were the two issues tried at the second trial, not only the issue of the amount of damages.

The judge again correctly charged the jury which ambulatory picketing activities were lawful, and which were unlawful, and, among several references to proximate cause in his charge which required the company to prove its damages were proximately caused by the unlawful activities of the union as contrasted to the lawful, told the jury:

> "You understand, of course, that you may not award the plaintiff damages simply because of lost money during the strike or for money lost as a result of the union engaging in legal and permitted activity. In a strike situation, infliction of losses both upon the union and the employer is to be expected. It is not an occasion for liability unless the losses resulted from illegal strike activity. For this reason, you may only award damages where Great Coastal has proved by a preponderance of the evidence that it was so damaged."

We think this case is not one where the plaintiff should be faulted out of its judgment for not proving its damages with more exactness and precision. The Supreme Court has held, in an anti-trust case, that where the amount of damages cannot be ascertained with certainty, "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555, 563, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931). This circuit has previously adopted the *Story Parchment* reasoning in an action under 29 U.S.C. § 187 very similar to the one at hand. United Mine Workers v. Patton, 211 F.2d 742 (4th Cir. 1954). IBT's contention that Local 20, Teamsters Union v. Morton, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964), would mandate a contrary result is not well founded, for

Morton was a completely different case. In *Morton*, the district court, sitting without a jury, awarded the plaintiff $9,000 damages, under state law as a pendent claim, for loss of one of its customers, as a part of plaintiff's total damages. The customer had been persuaded by the union to cease doing business with the plaintiff, but its employees had not been approached. The Supreme Court held that the district court had no power to award damages proximately caused by such lawful, primary activities, since permitted by federal law, even though state law would have allowed a recovery in such a case. 377 U.S. at 259-260, 84 S.Ct. 1253. Along the same line, the court set aside the judgment for loss of certain customers whose business had been discouraged because of the strike, but who were not affected by any unlawful activity, because the union should not be responsible for damage by lawful activity even though it may have been engaged in unlawful activity elsewhere. 377 U.S. at 261-262, 84 S.Ct. 1253. But the court sustained the judgment of the trial court for damages for unlawful secondary boycott activities, the district court having in its opinion separated the items of damage.

In this regard, IBT argues that the court should have required a special verdict from the jury. F.R.Civ.P. 49 gives district courts broad discretion in determining the form of verdict. While we have no occasion here to decide whether the district judge has uncontrolled discretion in this regard,[3] we do note that there apparently has never been a reversal for abuse of discretion in determining the form of verdict.[4] We hold, with Toth v. Corning Glass Works, 411 F.2d 912, 914, n. 2 (6th Cir. 1969), that where the complaining party made no request

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[3] See Skidmore v. Baltimore & Ohio RR., 167 F.2d 54, 66-67 (2nd Cir. 1948), cert. den., 335 U.S. 816, 68 S.Ct. 34, 93 L.Ed. 371 (1948).

[4] 9 Wright and Miller, Federal Practice and Procedure, Civil, § 2505, p. 492, 5A Moore's Federal Practice, 2d Ed., 1974, ¶ 49.03(1), p. 2208.

for a special verdict to the trial court, it cannot raise the issue for the first time on appeal. Since IBT acceded to the general verdict without complaint in both trials in the court below, it may not now assign error in the district court's submission of the issues by way of general verdict.

Turning now to the issue of whether a partial new trial was appropriate, we note that such is expressly permitted by F.R.Civ.P. 59(a). The principal case with respect to ordering a new trial as to damages only is Gasoline Products Co. v. Champlin Co., 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931). The court, in *Gasoline Products*, held "that, where the requirement of a jury has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again." 283 U.S. at 499, 51 S.Ct. at 515. The court then proceeded to analyze the contracts in dispute to determine whether the damages and liability issues were separable, and concluded that, although the verdict on the contract sued upon by the plaintiff was affirmed, since the first verdict on the counterclaim was for less than the total damages claimed on various contracts, the extent of the damages depended on the extent of the undertakings which were in dispute, and the issues were so interwoven that a second jury could not fairly consider damages alone in a new trial on the counterclaim. And, it is noteworthy that the court did separate and let stand the verdict for the plaintiff on the contract sued upon without a new trial.

This court has considered new trials limited to damages on several occasions since the *Gasoline Products* case. It is well settled that granting or denying a new trial, either for excessiveness or inadequateness of the verdict, is discretionary with the trial court, and not reviewable absent a showing of abuse of discretion. Young v. International Paper Co., 322 F.2d 820, 822 (4th Cir.

1963). Most of the cases considered by this court have concerned the district court's discretion in ordering a partial new trial for inadequate damages, but the same general principles apply whether the verdict is attacked either for inadequacy or excessiveness. DeFoe v. Duhl, 286 F.2d 205 (4th Cir. 1961) (citing Virginia law); see *Note*, 29 A.L.R.2d 1202 (on inadequacy). The only case where a new trial on all issues was suggested because of excessive damages was United Construction Workers v. Haislip Baking Co., 223 F.2d 872 (4th Cir. 1955), cert. den., 350 U.S. 847, 76 S.Ct. 87, 100 L.Ed. 754 (1955).

In *Haislip Baking*, an action based on 29 U.S.C. § 185(b), it is true the court stated that "[t]he verdict on the first trial was so excessive and so manifestly based on improper consideration, instead of upon the record, that it should have been set aside in its entirety and a complete new trial ordered," but the court then proceeded to direct entry of judgment for the defendant instead of remanding for a new trial. The jury in that case had erroneously not been instructed on mitigation of damages and had erroneously been allowed to consider the parent union as responsible for a wildcat strike. It was this latter consideration the court referred to in its reference to the record. Neither consideration is present here, and even considering the above quoted statement from *Haislip* as a holding, it does not control the disposition of this case.

In another Fourth Circuit case involving excessive damages, the trial court ordered a remittitur instead of a partial new trial. Ford Motor Co. v. Mahone, 205 F.2d 267 (4th Cir. 1953). This court reversed and ordered a new trial as to all the issues when it was found that one of the jurors had obvious partisan bias in favor of one of the parties, and this in a "hotly contested" trial as to both liability and damages which resulted in a verdict the court found based on pity and sympathy. Likewise, that problem is not presented in this case.

This court has noted that there is "always a presumption in favor of the validity of a verdict if it is the result of honest judgment," City of Richmond v. Atlantic Co., 273 F.2d 902, 916 (4th Cir. 1960), but has found a new trial on all issues to be required where a totally inadequate verdict was rendered which could only have been a sympathy or compromise verdict. Southern Railway v. Madden, 235 F.2d 198 (4th Cir. 1956), cert. den., 352 U.S. 953, 77 S.Ct. 328, 1 L.Ed.2d 244 (1956). But where there is no substantial indication that the liability and damage issues are inextricably interwoven, or that the first jury verdict was the result of a compromise of the liability and damage questions, a second trial limited to damages is entirely proper. Young v. International Paper Co., supra; Mason v. Mathiasen Tanker Industries, Inc., 298 F.2d 28 (4th Cir. 1962), cert. den. 371 U.S. 828, 83 S.Ct. 23, 9 L.Ed.2d 66 (1962).

The matter of a partial new trial has been frequently considered since *Gasoline Products* and its subsequent articulation in F.R.Civ.P. 59(a), and one of the leading texts states that it "may be regarded as settled that if an error at the trial requires a new trial on one issue, but this issue is separate from the other issue in the case and the error did not affect the determination of the other issues, the scope of the new trial may be limited to the single issue." 11 Wright & Miller, Federal Practice and Procedure, Civil (1973), p. 93; see also Moore's Federal Practice, 2nd Ed., 1974, ¶ 59.06. And, we have held in Young v. International Paper Company, supra, that the action of a district judge in setting aside a verdict as to damages, and at the same time refusing to set aside the same verdict as to liability, should be affirmed unless the district judge abused his discretion.

In short, our task here is to determine whether this district court's conclusion that the first verdict was based on honest judgment by a well-intentioned jury, and that the liability and damage issues were not inextricably in-

tertwined, so that a partial new trial was fair to both parties, was an abuse of discretion, and whether the presumption of the validity of the verdict has been overcome. IBT argues that the evidence of violence heard by the jury, before the court directed a verdict against the company as to that issue, so inflamed the jury, and caused them to render a verdict in excess of damages proven, that the entire verdict was tainted. We cannot agree. The court charged the jury that no acts of violence testified to could be considered in assessing any damages, and that damages were limited to losses which flow proximately from any illegal activity the jury might find. During deliberations, the jury inquired of the court, "What amount of damages lost in dollars is the plaintiff asking? Is it the $942,065 figure?," to which the court responded ". . . yes . . . I must tell you that you are not to concern yourselves with what the plaintiff asks for unless it coincides with the evidence as you find it." 350 F.Supp. at 1378. It is obvious from the foregoing that the jury did not consider the $942,065 as a limiting figure, but we are unable to say from the record that the excessive verdict was caused from anything more than a misunderstanding of the jury charge as not limiting the recovery to pecuniary loss as mentioned in the question asked the court. There is no basis to support the defendant's contention that the first verdict was fatally infected by prejudice. To hold otherwise would be speculation on our part as to what the jury considered in its deliberations, and this we should not do, for, in the words of Mr. Justice Brandeis, "[a]ppellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 485, 53 S.Ct. 252, 255, 77 L.Ed. 439 (1933). Since no error is alleged as to any of the evidence, jury charges, or other relevant proceedings during the first trial, and especially considering the admitted and abundant evidence as to illegal secondary boycott activities, we are of opinion

that the presumption in favor of the validity of the first verdict, insofar as it applies to the finding of IBT's liability, has not been overcome. City of Richmond v. Atlantic Co., supra.

Nor are we able to agree that the issues of liability and damages were so closely intertwined that the second jury should not consider the issue of damages apart from liability. The jury in the first trial, under proper instructions, ascertained liability, and in the second trial the judge ever so carefully charged the jury only that the defendant had been found liable for certain acts of unlawful secondary boycott activity, and having again defined which activities were lawful and which were not, left to the jury the question which of the unlawful acts, if any, caused damage to the plaintiff, and which did not, and also the amount of the damages. We thus find the ruling of the district court as it awarded a partial new trial was not an abuse of discretion and free from exception. We are of opinion the issues in the second trial were properly separated from those in the first, and that the issues of liability and damages were not so inextricably interwoven that a new trial was required on all issues. We are further of opinion this phase of the case is controlled by those cases exemplified by Young v. International Paper Co., and Mason v. Mathiasen Tanker Industries, Inc.

The union's final contention that the second jury was improperly instructed is likewise without merit. It complains that the district judge only instructed the jury that the activity of the union at certain of the plaintiff's customers, and as to certain of such customers' employees, had been found to be unlawful. This instruction, as we have before mentioned, was proper, and indeed could only have been favorable to the defendant, for the plaintiff took the position and offered evidence which tended to show that all its damages claimed in the second trial were caused by the unlawful activities of the defendant as

distinguished from the lawful. The defendant had every opportunity, in the second trial as at the first, to contest both the proximate cause of the damage as well as its amount, and yet offered no evidence. The fact that the trial tactics did not succeed may not be laid to the district judge, whose every act complained of was free from exception.

Accordingly, the judgment of the district court is

Affirmed.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 73-2393 and 73-2448

GREAT COASTAL EXPRESS, INC.,
Plaintiff-Appellee-Cross Appellant.

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an Unincorporated Association,
Defendant-Appellant-Cross Appellee.

Nov. 14, 1975

Rehearing and Rehearing En Banc Denied Nov. 14, 1975

Sidney Dickstein, Washington, D.C. (George Kaufmann, Anthony F. Troy, Ira R. Mitzner and Dickstein, Shapiro & Morin, Washington, D.C., on brief), for defendant-appellant in No. 73-2393 and for plaintiff-appellee in No. 73-2448.

J. W. Alexander, Jr., Charlotte, N.C. (James M. Minor, Jr., Richmond, Va., and John O. Pollard, Charlotte, N.C., on brief), for plaintiff-appellee in No. 73-2393 and for defendant-appellant in No. 73-2448.

ORDER

WIDENER, Circuit Judge.

Upon the petition for rehearing en banc, 4 Cir., 511 F.2d 839, no member of the court in regular active ser-

vice has requested a poll of the court to reconsider the case en banc.

We have considered the petition for rehearing and are of opinion it is without merit.

In our consideration of the petition for rehearing, we note the issue that whether or not the International was properly chargeable with actions which may, in some instances, have been committed by officers or members of the Local was submitted to the jury, as a matter of fact, among other instructions which included the following:

> "In short, in order to hold the International liable for acts committed by members of Local 592 you must find either, one, that the International participated in the illegal secondary activity in that the persons involved were not only subject to its control with respect to the activities and the manner of performing them, but also the activities were done while on the business of the International or for its benefit; or two, that the International ratified any illegal actions in that the International knew that such illegal secondary activity occurred and either took action which showed an intent to avail itself of the benefits of the illegal acts, or took no action under circumstances such as would make it the duty of the International to repudiate the acts. Thus the burden is on Great Coastal to prove that if any member of Local who may have committed unlawful secondary activity did so on behalf of the International."

The petition for rehearing is denied.

With the concurrences of DONALD RUSSELL and FIELD, Circuit Judges.